(14,842.)

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1894.

No. 292.

THE COUNTY OF GRATIOT, PLAINTIFF IN ERROR,

vs.

HENRY M. AYLESWORTH.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF MICHIGAN.

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JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C., NOVEMBER 6, 1894.

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1 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the honorable the judges of the circuit court of the United States for the eastern district of Michigan, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said circuit court, before you or some of you, between Henry M. Aylesworth, plaintiff, and The County of Gratiot, defendant, a manifest error hath happened, to the great damage of the said County of Gratiot, as by its complaint appears, we, being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the second Monday of October next, in the said Supreme Court to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

Seal of the Circuit Court, Eastern District of Michigan.

Witness the Honorable Melville W. Fuller, Chief Justice of the said Supreme Court, the 13th day of October, in the year of our Lord one thousand eight hundred and ninety.

WALTER S. HARSHA,
Clerk of the Circuit Court of the United States for the Eastern District of Michigan.

Allowed by—
HENRY B. BROWN,
District Judge.

2 [Endorsed:] 7705. Aylesworth *v.* County of Gratiot. Writ of error. Issued & filed Oct. 13, 1890. Walter S. Harsha, clerk.

3 THE UNITED STATES OF AMERICA:

To Henry M. Aylesworth, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States to be holden at Washington on the second Monday of October next, pursuant to a writ of error filed in the clerk's office of the circuit court of the United States for the eastern district of Michigan, wherein the said Henry M. Aylesworth is defendant in error and The County of Gratiot is plaintiff in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in the said writ of error mentioned,

should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States, this 13th day of October, in the year of our Lord one thousand eight hundred and ninety.

HENRY B. BROWN,
District Judge.

4 On this 24th day of October, in the year of our Lord one thousand eight hundred and ninety, personally appeared Walter S. Harsha before me, the subscriber, a commissioner of the circuit court of the United States for the eastern district of Michigan, and makes oath that he delivered a true copy of the within citation to Thomas S. Jerome, one of the attorneys of record for Henry M. Aylesworth, defendant in error.

WALTER S. HARSHA.

Sworn to and subscribed the 24th day of October, A. D. 1890.

[Seal Jno. Graves, U. S. Commissioner.]

JNO. GRAVES,
U. S. Commissioner, East. Dist. of Mich.

[Endorsed:] 7705. Aylesworth *v.* County of Gratiot. Citation, with proof of service. Filed Oct. 24, 1890. Walter S. Harsha, clerk.

5 *Præcipe for Summons.*

The Circuit Court of the United States for the Eastern District of Michigan.

HENRY M. AYLESWORTH
vs.
THE COUNTY OF GRATIOT.

To the clerk of said court:

Please let a summons in assumpsit, returnable May 7th, A. D. 1889, issue—damages, ten thousand dollars—in the above-entitled cause, wherein Henry M. Aylesworth, a citizen and resident of the State of New York, is plaintiff and The County of Gratiot, a corporation organized under the laws of the State of Michigan and citizen of the same and resident of the eastern district of Michigan, is defendant.

Yours, etc.,

DABOLL & BRONSON,
Attorney-for Plaintiff.

MARSTON, COWLES & JEROME, *Of Counsel.*

Filed March 29th, 1889.

WALTER S. HARSHA, *Clerk.*

6 *Security for Costs.*

Circuit Court of the United States for the Eastern District of Michigan.

HENRY M. AYLESWORTH
vs.
THE COUNTY OF GRATIOT.

We hereby acknowledge ourselves security for the payment of all costs for which the plaintiff may become liable in the above-entitled suit.

MARSTON, COWLES & JEROME.

Dated Detroit, Michigan, March 29, '89.

Filed March 29th, 1889.

WALTER S. HARSHA, *Clerk.*

7 *Summons.*

The President of the United States of America to the marshal of the eastern district of Michigan, Greeting:

You are hereby commanded that you summon The County of Gratiot, a municipal corporation organized under the laws [SEAL.] of the State of Michigan, citizen of the State and resident of the eastern district of Michigan, if it shall be found in your district, to be and appear in the circuit court of the United States of America for the eastern district of Michigan, to be held at Detroit, in the said district, before the judges of the said court, on the seventh day of May next, to answer unto Henry M. Aylesworth, a citizen and resident of the State of New York, plaintiff in an action of trespass on the case upon promises, to his damage ten thousand dollars; and have you then and there — writ.

Witness the Hon. Melville W. Fuller, Chief Justice of the Supreme Court of the United States, this 29th day of March, in the year of our Lord one thousand eight hundred and eighty-nine, and of our Independence the one hundred and thirteenth.

WALTER S. HARSHA, *Clerk.*

Filed April 2nd, 1889.

WALTER S. HARSHA, *Clerk.*

8 *Proof of Service.*

EASTERN DISTRICT OF MICHIGAN, *ss:*

I hereby certify and return that upon the 30th day of March, A. D. 1889, I served the within writ on the within-named County of Gratiot, defendant, at Ithaca, Gratiot Co., in said district, by delivering to Marvin P. Salter, clerk of said county of Gratiot, personally a true copy thereof, and at the same time showing him this

original, with the seal of the court imposed thereon, and calling his attention to the same.

G. PENNELL, *Marshal*,
By S. GALLOWAY, *Deputy*.

Service	2	
112 miles	6	72
Copy		50
Fees	9	22
Hotel bill over Sunday	3	00

9 *Amended Declaration.*

The Circuit Court of the United States for the Eastern District of Michigan.

Henry M. Aylesworth, who is a citizen of the State of New York, plaintiff herein, by Marston, Cowles & Jerome, his attorneys, comes into court and complains of the county of Gratiot, a municipal corporation situated and existing in the State of Michigan, in the eastern district thereof, and citizen of said State, having been duly summoned to answer the said plaintiff of a plea of trespass on the case upon promises—

For that whereas the said defendant was heretofore, to wit, during the years 1871, 1872, and 1873, a lawfully organized county of said State, and was, to wit, on November 2nd, A. D. 1871, justly indebted to one William Byrne in the sum of five hundred and sixty-eight dollars, and was, to wit, on November 7th, A. D. 1872, justly indebted to one John Scriven in the sum of three hundred and seventy-six dollars, and was, to wit, on October 24th, A. D. 1873, justly indebted to said John Scriven in the sum of one thousand one hundred and seventy-seven dollars and eighty cents for work and labor done and materials furnished upon and right of way secured for a certain drain and ditch known as the Newark and Arcada ditch, in said county, and was, to wit, on October 24th, A. D. 1873, justly indebted to said John Scriven in the sum of one thousand one hundred and ninety-seven dollars and eighty-seven cents for work and labor done and materials furnished upon and right of way secured for a certain drain and ditch known as the
10 Newark & New Haven ditch, in the township of New Haven, in said county, all of which indebtedness for which said drains and ditches was incurred in all respect- as provided by law.

And whereas, by reason of the premises, one Philip Burlingame, the drain commissioner for said county, to wit, on November 2nd, A. D. 1871, did, as provided by law, draw upon the treasurer of said county his certain warrant and order numbered eighty-nine, directing said treasurer of said county to pay to William Byrne or bearer five hundred and sixty-eight dollars out of the drain tax assessed on the township of Newark for the construction of the Newark and Arcada ditch, in said township.

And D. W. Attenburg, the drain commission- of said county, to

wit, on November 7th, A. D. 1872, did, as provided by law, draw upon said treasurer as aforesaid his certain warrant and order numbered two hundred and fifty-seven, directing the said treasurer to pay to John Scriven or bearer three hundred and seventy-six dollars out of the drain tax assessed in the township of Arcada for the construction of the Newark and Arcada ditch, in said township.

And said Attenburg, as such drain commissioner, to wit, on October 24th, A. D. 1873, did, as provided by law, draw his several warrants and orders numbered three hundred and sixty-eight, three hundred and seventy, three hundred and seventy-one, three hundred and seventy-two, and three hundred and seventy-three upon the said treasurer of said county, directing the said treasurer to pay to John Scriven or bearer sums aggregating two thousand three hundred and seventy-five dollars and sixty-seven cents (that is to say, number 368 for $510.60, number 370 for $547.20, number
11 371 for $120, number 372 for $518.94, and number 373 for $678.93) out of the drain tax assessed in the townships of Newark, Arcada, and New Haven, in said county, for the Newark and Arcada and the Newark and New Haven ditches, in said townships (that is to say, numbers 368 and 370 out of the drain tax assessed in the township of Newark for the Newark and Arcada, in said township; number 371 out of the drain tax assessed in the township of Arcada for the Newark and Arcada ditch, in said township, and numbers 372 and 373 out of the drain tax assessed in the township of New Haven for the Newark and New Haven ditch, in said township).

All of which said warrants were severally duly and properly countersigned by the chairman of the board of supervisors of said county and the clerk of the same, as provided by law.

And whereas said warrants or orders were presented afterwards, to wit, number eighty-nine on November 6th, 1871, to William S. Turck, treasurer of said county; number two hundred and fifty-seven on November 10th, 1872, to said Turck, treasurer as aforesaid; number three hundred and seventy-two on October 24th, 1873, to S. W. Ambler, deputy treasurer as aforesaid, and number three hundred and sixty-eight, three hundred and seventy, three hundred and seventy-one, and three hundred and seventy-three on October 25th, 1873, to said Ambler, deputy treasurer as aforesaid, and the dates of such several presentations were duly indorsed on each several warrant or order by the said Turck and Ambler respectively as such officers, to whom each warrant was respectively presented, with their respective signatures thereto, as provided by law.

12 And all other things were done as required by law to make these valid and subsisting claims upon said defendant, and which said warrants and orders were made by a corporation.

Whereby, in consideration of the premises, the said defendant then and there became indebted to the said William Byrne in the amount of the face of said warrant and order number eight'-nine, to wit, five hundred and sixty-eight dollars, with interest from and after the date of aforesaid presentations, and to the said John Scriven in the amount of the face of said warrant and orders numbers two

hundred and fifty-seven, three hundred and sixty-eight, three hundred and seventy, three hundred and seventy-one, three hundred and seventy-two, and three hundred and seventy-three, to wit, two thousand seven hundred and fifty-one dollars and sixty-seven cents, with interest from and after the several dates of presentations as aforesaid.

And, being so indebted, the said defendant did afterwards, to wit, on the sixth day of November, 1871, and at the place aforesaid undertake and faithfully promise said William Byrne to pay him or bearer the aforesaid sum of money in said warrant or order number eighty-nine specified, with interest from the date of presentation and indorsement; and the said defenda-t did afterwards, to wit, on the sixteenth day of November, 1872, and at the place aforesaid undertake and faithfully promise said John Scriven to pay to him or bearer the aforesaid sum of money in said warrant or order number two hundred and fifty-seven specified, with interest from the date of presentation and indorsement; and the said defendant did afterwards, to wit, on October 25th, 1873, undertake and
13 faithfully promise said John Scriven to pay to him or bearer the aforesaid sums of money in said warrants or orders numbers three hundred and sixty-eight, three hundred and seventy, three hundred and seventy-one, three hundred and seventy-two, and three hundred and seventy-three specified, with interest from the date of presentation and acceptance.

And whereas all right, title, and interest in and to each and every of said warrants and orders has, for good and valuable consideration, been transferred, assigned, and set over unto said plaintiff and the same delivered unto him;

And whereas upon said warrants or orders, with accrued interest, there is still due and unpaid a large sum of money, to wit, ten thousand dollars:

Yet so it is that the said defendant, though often requested so to do, has not yet *been* paid the said sum of money above mentioned to said plaintiff, but to pay the same or any part thereof the said defendant has wholly refused and does still refuse, to the damage of said plaintiff ten thousand dollars.

For that whereas the defendant heretofore, to wit, on the twenty-fifth day of October, A. D. 1873, at the said county of Gratiot, in said district, was indebted to William Byrne and John Scriven severally in the sum of ten thousand dollars—

And in a like sum for the prices and value of work then and there done and materials for the same provided by said Byrne and Scriven severally for the defendant at its request—

And in a like sum for money then and there paid by said Byrne and Scriven severally for the use of the defendant at its re-
14 quest—

And in a like sum for money then and there found to be due from the defendant to said Byrne and Scriven severally on an account stated between them.

And thereupon the said defendant afterwards and on the day and year aforesaid, in consideration of the premises respectively,

then and there promised said Byrne and Scriven severally to pay them the several sums of money respectively on request, all of which said claims have been duly and properly assigned by said Byrne and Scriven severally to said plaintiff. Yet the said defendant has disregarded its said promises and has not (although often requested so to do) paid any of the sums of money or any part thereof, to the plaintiff's damage of ten thousand dollars.

Whereby and by reason of the premises the said plaintiff is entitled to a judgment against said defendant for the amount due and unpaid upon said orders, such judgment to be paid by causing the amount thereof, with interest and costs, to be assessed upon the lands benefited by the construction of the said ditches.

All to the damage of said plaintiff ten thousand dollars, and therefore he brings suit.

MARSTON, COWLES & JEROME,
Plaintiff's Att'ys.

To the above-named defendants:

Take notice that on the trial of the above cause the plaintiff, under the money counts, will give in evidence certain warrants and orders, copies of which, with counter-signatures, indorsements of presentation, and indorsements of payments, are given below.

MARSTON COWLES & JEROME,
Plaintiff's Attorney.

(Copy.)

No. 89. ITHACA, MICH., *November 2nd*, 1871.

County treasurer, Gratiot county,

Pay to William Byrne or bearer five hundred and sixty-eight dollars out of the drain tax assessed in the township of Newark for construction of Newark & Arcada ditch, in said township. Act No. 169, Laws of 1871.

$568.00. PHILIP BURLINGAME,
Drain Commissioner of Gratiot County.

Countersigned:
J. C. GIDDINGS,
Chairman of the Board of Supervisors.
N. CHURCH, *Clerk.*

(Endorsed:) Presented for payment this 6th day of November, A. D. 1871. Wm. S. Turck, treasure- of Gratiot Co., Mich. Paid March 31st, 1883, on the within order two hundred dollars, $200.00. S. B. Heverlo, Co. treasurer. Rec'd March 31st, '83, of said Co. treasurer the above $200 as the agent of Eliza W. Brownell, of Niagara Co., N. Y. W. E. Winton.

16 No. 257. ITHACA, MICH., *Nov. 7th*, 1872.

County treasurer, Gratiot county,

Pay to John Scriven or bearer three hundred and seventy-six dollars out of the drain tax assessed in the township of Arcada for construction of Newark & Arcada ditch, in said township. Act No. 169, Laws of 1871.

$378.00. D. W. ATTENBURG,
Drain Commissioner of Gratiot County.

Countersigned:
H. T. BARNABY,
Chairman of the Board of Supervisors.
N. CHURCH, *Clerk.*

(Endorsed:) Presented for payment this 16th day of November, A. D. 1872. W. S. Turck, treasurer of Gratiot Co., Mich. Paid March 31st, 1883, on the within order one hundred forty-eight $\frac{46}{100}$ dollars. S. B. Heverlo, Co. treasurer. $148.46. Rec'd March 31, '83, of said Co. treasurer the above $148.46 as the agent of Eliza W. Brownell, of Niagara Co., N. Y. W. E. Winton.

No. 368. ITHACA, MICH., *Oct. 24th*, 1873.

County treasurer, Gratiot county,

Pay to John Scriven or bearer five hundred and ten and $\frac{60}{100}$ dollars out of the drain tax assessed in the township of Newark. Act No. 169, Laws of 1871.

$510.60. D. W. ATTENBURG,
Drain Commissioner of Gratiot County.

17 Countersigned:
W. S. EVEREST,
Chairman of the Board of Supervisors.

W. B. SCATTERGOOD, *Dep'y Clerk.*

(Endorsed:) Presented for payment this 25th day of September, A. D. 1873. S. W. Ambler, dep'y treasurer of Gratiot Co., Mich. Paid on the within, March 31st, 1883, two hundred dollars, $200. S. B. Heverelo, Co. treasurer. Rec'd March 31, '83, of said Co. treasurer the foregoing $200 as the agent of Eliza W. Brownell, of Niagara Co., N. Y. W. E. Winton.

No. 370. ITHACA, MICH., *Oct. 24th*, 1873.

County treasurer, Gratiot county,

Pay to John Scriven or bearer five hundred and forty-seven and $\frac{20}{100}$ dollars out of the drain tax assessed in the township of Newark

for construction of Newark & Arcada ditch. Act No. 169, Laws of 1871.

$547.20. D. W. ATTENBURG,
Drain Commissioner of Gratiot County.

Countersigned:
W. S. EVEREST,
Chairman of the Board of Supervisors.
W. B. SCATTERGOOD, *Dep'y Clerk.*

(Endorsed:) Presented for payment this 25th day of October, A. D. 1873. S. W. Ambler, dep'y treasurer of Gratiot Co., Mich. Paid March 31st, 1883, on the within order two hundred dol-
18 lars, $200.00. S. B. Heverlo, Co. treasurer. Rec'd March 31st, '83, of said Co. treasurer the *following* $200 as the agent of Eliza W. Brownell, of Niagara Co., N. Y. W. E. Winton.

No. 371. ITHACA, MICH., *Oct. 24th*, 1873.

County treasurer, Gratiot county,

Pay to John Scriven or bearer one hundred and twenty dollars out of the drain tax assessed in the township of Arcada for the construction of the Newark & Arcada ditch. Act No. 169, Laws of 1871.

$120.00. D. W. ATTENBURG,
County Drain Commissioner of Gratiot County.

Countersigned:
W. S. EVEREST,
Chairman of the Board of Supervisors.
W. B. SCATTERGOOD, *Dep'y Clerk.*

(Endorsed:) Presented for payment this 25th day of October, A. D. 1873. S. W. Ambler, dep. treasurer *treasurer* of Gratiot Co., Mich.

No. 372. ITHACA, MICH., *Oct. 24th*, 1873.

County treasurer, Gratiot county,

Pay to John Scriven or bearer five hundred and eighteen and $\frac{94}{100}$ dollars out of the drain tax assessed in the township of New Haven for construction of the Newark & New Haven ditch. Act No. 169, Laws of 1871.

$518.94. D. W. ATTENBURG,
County Drain Commissioner of Gratiot County.

19 Countersigned:
J. C. GIDDINGS,
Chairman of the Board of Supervisors.
W. B. SCATTERGOOD, *Dep. Clerk.*

(Endorsed:) Presented for payment this 24th day of October, A. D. 1873. S. W. Ambler, dep'y treasurer of Gratiot Co., Mich. Rec'd on the within twenty-seven and $\frac{16}{100}$ dollars Nov. 27th, 1875.

No. 373. ITHACA, MICH., *Oct. 24th*, 1873.

County treasurer, Gratiot county,

Pay to John Scriven or bearer six hundred and seventy-eight and $\frac{93}{100}$ dollars out of the drain tax assessed in the township of New Haven for construction of the Newark & New Haven ditch. Act No. 169, Laws of 1871.

$678.93. D. W. ATTENBURG,
County Drain Commissioner of Gratiot County.

Countersigned:
W. S. EVEREST,
Chairman of the Board of Supervisors.
W. B. SCATTERGOOD, *Dep'y Clerk.*

(Endorsed:) Presented for payment this 25th day of October, A. D. 1873. S. W. Ambler, dep. treasurer of Gratiot Co., Mich. Paid March 31st. 1883, on the within order two hundred dollars, $200.00. S. B. Heverlo, Co. treasurer. Rec'd March 31, '83, of said Co. treasurer the above $200 as the agent of Eliza W. Brownell, of Niagara Co., N. Y. W. E. Winton.
Filed May 7th, 1889. Walter S. Harsha, clerk.

20 *Præcipe for Entry of Appearance.*

STATE OF MICHIGAN:

The Circuit Court of the United States for the Eastern District of Michigan.

HENRY M. AYLESWORTH
vs.
THE COUNTY OF GRATIOT.

Please enter the appearance of defendants in the above-entitled cause.

Yours, B. H. SAWYER &
C. J. WILLETT,
Att'ys for Defendant.

Dated May 26th, 1889.
To Walter S. Harsha, Esq., clerk of said court.

Filed May 27th, 1889.
WALTER S. HARSHA, *Clerk.*

21 *Appearance of Defendant.*

The Circuit Court of the United States for the Eastern District of Michigan.

HENRY M. AYLESWORTH
vs.
THE COUNTY OF GRATIOT.

On filing præcipe in this cause and on motion of B. H. Sawyer and C. J. Willett, att'ys for def't, it is ordered that the appearance of said defendant be, and the same is hereby, entered.

WALTER S. HARSHA, *Clerk.*

H. B. SAWYER & C. J. WILLETT,
Att'ys for Def't.

Dated May 27th, 1889.

22 *Plea & Notice.*

The Circuit Court of the United States for the Eastern District of Michigan.

HENRY M. AYLESWORTH
vs.
THE COUNTY OF GRATIOT.

Now comes the said defendant, by B. H. Sawyer and C. J. Willett, its attorneys, — demands a trial of the matters set forth in the plaintiff's declaration.

B. H. SAWYER &
C. J. WILLETT,
Att'ys for Defendant.

SIRS: Please take notice that on the trial of this cause the defendant will give in evidence under the general issue above pleaded and insist in its defense:

First. That the said alleged cause- of action did not nor did any of them accrue to the plaintiffs at any time within six years before the commencement of this suit in manner and form as set forth in said declaration.

Second. That the orders which, on the foundation of plaintiff's suit, *on* payable out of a special assessment *which* could not be collected, owing to the misconduct of party through whom he claims title.

23 Third. That the cause of action set up in plaintiff's declaration has once been adjudicated in the supreme court of the

State of Michigan in Brownell *vs.* Gratiot Supervisors, reported in 49 Mich. Reports, page 414.

Yours, etc.,

B. H. SAWYER &
C. J. WILLETT,
Att'ys for Defendant.

Dated June 12th, 1889.

To Marston, Cowles & Jerome, plaintiff's attorneys.

Filed June 13th, 1889.

WALTER S. HARSHA, *Clerk.*

24 *Trial Begins.*

At a session of the circuit court of the United States for the eastern district of Michigan, continued and held, pursuant to adjournment, at the district court room, in the city of Detroit, on Thursday, the seventh day of November, in the year one thousand eight hundred and eighty-nine.

Present: The Honorable Henry B. Brown, district judge.

HENRY M. AYLESWORTH
vs.
THE COUNTY OF GRATIOT.

The parties in this cause being in court, by their respective attorneys, ready for trial, thereupon comes a jury, namely, Robert W. Griswold, Chas. Ten Eyck, James J. Campau, Charles M. Thompson, Thurlow A. Strong, Thomas J. Kean, Alexander Webber, Eliot J. Smith, Michael Cronin, George R. Tracy, William M. Perry, and George Haight, good and lawful men, who are duly impaneled, tried, and sworn well and truly to try the issue between the parties and sit together and hear the evidence in the case.

25 *Verdict.*

At a session of the circuit court of the United States for the eastern district of Michigan, continued and held, pursuant to adjournment, at the district court room, in the city of Detroit, on Saturday, the thirtieth day of November, in the year one thousand eight hundred and eighty-nine.

Present: The Honorable Henry B. Brown, district judge.

HENRY M. AYLESWORTH
vs.
COUNTY OF GRATIOT. } 7705.

In this cause the jurors heretofore impaneled and sworn come into court again and sit together, and, under the instructions of the court, without leaving their seats, say upon their oath that the said defendant did undertake and promise in manner and form as the said plaintiff hath in his declaration in this cause complained against it,

and they assess the damages of the said plaintiff on occasion of the promises at the sum of four thousand eight hundred and sixty-eight dollars and seventy-four cents. The defendant is allowed ten days in which to move for a new trial. The plaintiff is allowed ten days in which to move to amend his declaration.

26 *Notice of Motion to Amend Declaration.*

In the Circuit Court of the United States for the Eastern District of Michigan.

HENRY M. AYLESWORTH
vs.
THE COUNTY OF GRATIOT.

To Messrs. B. H. Sawyer and C. J. Willett, attorneys for defendant:

Please take notice that on Monday, December 9th, 1889, at ten o'clock in the forenoon, or as soon thereafter as counsel can be heard, a motion will be made in the above-entitled cause for leave to amend the declaration filed therein by adding thereto, upon page 6, after the words "to the plaintiff's damage ten thousand dollars" and before the words "all to the damage of said plaintiff, etc.," the following: "Whereby and by reason of the premises the said plaintiff is entitled to a judgment against said defendant for the amount due and unpaid upon said orders; such judgment to be paid by causing the amount thereof, with interest and costs, to be assessed upon the lands benefited by the construction of the said ditches."

Yours, etc.,

MARSTON, COWLES AND JEROME,
Attorneys for Plaintiff.

Dated Dec. 2nd, 1889.

Filed April 14th, 1889.

WALTER S. HARSHA, *Clerk.*

27 *Motion to Amend Declaration.*

The Circuit Court of the United States for the Eastern District of Michigan.

HENRY M. AYLESWORTH, Plaintiff,
vs.
THE COUNTY OF GRATIOT.

And now comes the above-named defendant, by its attorneys, B. H. Sawyer and C. J. Willett, and moves the court to set aside and vacate the verdict heretofore entered in this cause and to grant a new trial of said cause for the following reasons:

1st. Because under the pleadings and evidence in said cause the verdict should have been for the defendant.

2nd. The court erred in directing the jury in said cause to render a verdict for said plaintiff.

This motion is based upon the files and records of this court in this cause and upon the evidence taken on the trial of this cause.

B. H. SAWYER &
C. J. WILLETT,
Attorneys for Defendant.

Dated Dec. 3rd, 1889.

28 *Time to Move for New Trial.*

At a session of the circuit court of the United States for the eastern district of Michigan, continued and held, pursuant to adjournment, at the district court room, in the city of Detroit, on Monday, the ninth day of December, in the year one thousand eight hundred and eighty-nine.

Present: The Honorable Henry B. Brown, district judge.

HENRY M. AYLESWORTH
vs.
COUNTY OF GRATIOT. } # 7705.

On motion of Mr. F. H. Canfield, of counsel for defendant, ordered that the time to move for a new trial be, and the same is hereby, extended ten days.

29 *Order to Amend Declaration.*

At a session of the circuit court of the United States for the eastern district of Michigan, continued and held, pursuant to adjournment, at the district court room, in the city of Detroit, on Monday, the fourteenth day of April, in the year one thousand eight hundred and ninety.

Present: The Honorable Howell E. Jackson, circuit judge, and the Honorable Henry B. Brown, district judge.

HENRY M. AYLESWORTH
vs.
COUNTY OF GRATIOT. } Before Full Bench. No. 7705.

In this cause, on plaintiff's motion, it is ordered that said plaintiff have leave to amend his declaration by adding thereto, upon page 6, after the words "to the plaintiff's damage ten thousand dollars" and before the words "all to the damage of said plaintiff, etc.," the following: "Whereby and by reason of the premises the said plaintiff is entitled to a judgment against said defendant for the amount due and unpaid upon said orders; such judgment to be paid by causing the amount thereof, with interest and costs, to be assessed upon the lands benefited by the construction of said ditches." The motion by plaintiff for a new trial is argued by counsel for respective parties and submitted.

30 *Motion for New Trial Denied.*

At a session of the circuit court of the United States for the eastern district of Michigan, continued and held, pursuant to adjournment, at the district court room, in the city of Detroit, on Tuesday, the twenty-second day of July, in the year one thousand eight hundred and ninety.

Present: The Honorable Henry B. Brown, district judge.

HENRY M. AYLESWORTH
vs.
COUNTY OF GRATIOT. } # 7705.

In this cause the motion by defendant for a new trial heretofore argued and submitted is by the court now here denied.

31 *Opinion of District Judge on Denying Motion for New Trial.*

Circuit Court of the United States for the Eastern District of Michigan.

HENRY M. AYLESWORTH
vs.
COUNTY OF GRATIOT.

NOV. 30TH, 1889.

An action lies in the Federal court upon drain orders drawn by a county drain commissioner upon a county treasurer, though the orders themselves create no debt against the county, and the sole duty of the county officers is to assess and collect the cost of constructing the drain from the owners of property benefited by it. In such case the judgment is special and is enforceable only by mandamus to compel the collection of the tax.

Such orders are so far negotiable that suit may be brought upon them by the holder, though the court would have no jurisdiction of an action brought by the assignor of such holder.

Such orders are *prima facie* valid, and plaintiff is not bound to prove the regularity of the proceedings for the assessment and collection of the tax.

A decision of the supreme court of the State denying relief to a prior holder of such orders is not *res adjudicate*.

32 This was an action upon certain orders originally issued to one John Scriven for work done and materials furnished in the construction of two drains in the defendant county, such drains being located in the townships of Newark, New Haven, and Arcada, and no other. These orders were issued in pursuance of act 43, Laws of 1869, as amended by act number 169, Laws of 1871. To the special count in the declaration were also attached the common counts, together with copies of these orders, which were signed by the drain commissioner and countersigned by the chairman and

clerk of the board of supervisors. An endorsement upon such orders show that they were presented for payment to the county treasurer about the time they were issued, and that on the 31st of March, 1883, all but one of them were again presented and a payment made thereon.

The following is a sample copy of the orders with there endorsements:

No. 257. ITHACA, MICHIGAN, *Nov. 7th*, 1872.

County treasurer, Gratiot county,

Pay to John Scriven or bearer three hundred and seventy-six dollars out of the drain tax assessed in the township of Arcada for construction of Newark and Arcada ditch in said township, act number 169, Laws 1871.

D. W. ATTENBURG,
Drain Commissioner of Gratiot County.

Countersigned:
H. T. BARNABY,
Chairman Board of Supervisors.
N. CHURCH, *Clerk.*

(Endorsed:) Presented for payment this 16th day of Nov., 1872. W. S. Turk, treasurer Gratiot county, Michigan. Paid March 31st, 1883, on the within order $148.46. S. B. Haverlo, county
33 treasurer. Received March 31, 1883, of said county treasurer the above $148.46 as the agent of Eliza W. Brownell, of Niagara county, New York. (Signed) W. E. Winton.

The defendant pleaded the general issue and gave notice of the following defences: First, the statute of limitation; second, that the orders were payable out of a special fund which was not supplied with funds with which to pay them on account of the action of the party through whom plaintiff claimed title; third, *res adjudicate*.

These drains were constructed by John Scriven under contract: First, with the drain commissioner of Gratiot county; second, under contract with E. W. Kellog, special commissioner, by act 445, Laws of 1871, which provided that certain State lands in Gratiot county might be used in the payment for certain drains located in said township. These lands were benefited by the construction of the drains and were assessed for the same. Before the assessment was reported to the commissioner of the land office, Scriven made his selection of lands in payment of his contract with Kellog. The commissioner of the land office would not issue patents to Scriven until these taxes were paid. In 1879 Scriven brought a suit in chancery in the circuit court for Gratiot county to set aside these taxes and compel the commissioner to issue patents, and had a decree in his favor as prayed. This decree was not appealed from and patents were issued. By this means the special fund from which these orders were to be paid was diminished by about $2,000. Had those taxes been collected by the land commissioner and

turned over to the county treasurer the orders would all have been paid.

34 In 1881 one Eliza W. Brownell, who claimed to have received these orders from Scriven, petitioned the supreme court of Michigan for a mandamus against the board of supervisors, compelling them to pay these orders. Her petition was denied. 49 Mich., 414.

Messrs. Marston and Jerome, for the plaintiff.

Messrs. F. H. Canfield and C. J. Willett, for the defendant.

BROWN, *J.*:

While this is nominally an action to recover the amount of these orders from the county, the real object is to procure the issue of a writ of mandamus for the collection of this tax from the property benefited by the drain. Several defences are interposed, which I will proceed to consider in their order.

1. That the orders created no obligation against the county. If by this it is intended merely to urge that the orders created no debt against the county which as a municipal corporation it is bound to pay, the position taken is correct. It is well settled that where public improvements are by law to be made at the expense of the adjoining property no charge against the corporation is created, and its only duty is to take the necessary and legal steps to collect the assessment and to pay it to the parties justly entitled thereto. Thus it was held in the case of Lake *vs.* Trustees of Williamsburg, 4 Denio, 520, in an action upon an order given by the president of a village upon the treasurer to pay the contractor a certain sum out of particular funds, that the corporation was the agent or

35 instrument of the landholder, having an interest in the matter to ascertain how much each one ought to pay and another to receive and collect the money from those who were benefited and see that it was properly applied to the particular object, and that this was the extent of its duty. It was held that the plaintiff could not recover generally against the corporation as for a debt, and it was intimated that the plaintiffs had a remedy by mandamus or by an action on the case against the trustees for neglect of duty. This is also the intimation of the Supreme Court in the case of Ogden *vs.* County of Daviess, 102 United States. 634, and I believe that the authorities are uniform to the effect that no action will lie against the county upon these obligations as for a debt chargeable against it. Goodrich *vs.* Detroit, 12 Mich., 279; Second National Bank of Lansing, 207. The proper remedy in this class of cases in the State courts is by writ of mandamus to compel the assessment and collection of the tax by the officers charged with that duty and payment of the same to the party entitled thereto.

As a petition for a writ of mandamus in the Federal court will not be entertained as an original proceeding, it was at one time supposed that no action of any kind would lie against a municipality. In the case of Boro *vs.* Phillips County, 4 Dillon, 216, it was held that the failure or refusal of the county to discharge its duty in such cases did not make it liable to a general judgment for

the obligations of the particular district and could not be made the foundation of an action against the county for a money judgment. This may be entirely true, and yet it does not follow that there is no remedy in the Federal court where the plaintiff is entitled to sue therein by reasons of his citizenship. The general
36 rule is believed to be without exception that where the plaintiff is otherwise entitled to relief in this court he will not be debarred therefrom by reason of the fact that his remedy in the State court, upon the same cause of action, would be of a character which we are not entitled to administer here. Hence, it was held by Judge Dillon, in the case of Jordan *vs.* Cass County, 3 Dillon, 185, that the holder of county bonds issued by a county court on behalf of a township voting aid to a railway might sue the county in the Federal court and recover judgment thereon, although such judgment could not be enforced against the county or its property or the tax-payers of the county at large, but only by mandamus to the county court to compel the levy and collection of the special tax according to the statute. This is believed to be the earliest case upon the subject, and the opinion is a very interesting and instructive one. This case was approved in The County of Cass *vs.* Johnson, 95 U. S., 360, and was applied in the case of Davenport *vs.* The County of Dodge, 105 U. S., 237, to bonds issued to county commissioner- on behalf of a precinct which had no corporate existence and could not contract or be contracted with. The court considered the bonds in this case as special bonds which the county commissioners were to issue for the precinct, and that they were in legal effect the special bonds of the county, payable out of a special fund to be raised in a special way. Similar ruling was made in the case of Blair *vs.* Cumming, 111 U. S., 363. This case differs from the others in the fact that the bonds contained no promise by the county to pay, but a promise by a precinct which had no separate corporate existence. Notwithstanding this the county was held liable to the performance of the obligation.

37 As the authority of the drain commissioner to draw these orders is unquestioned, it is evident that there must be a remedy in favor of the payee or holder against some one for payment. It is an axiom of the law that for every wrong there is a remedy. It is evident, however, there can be no remedy against the commissioner, as he has no corporate powers and as he is required by law to draw these orders upon the county treasurer in behalf of the contractor, but has no power to enforce the collection of the tax or to provide in any other way for their payment. It is equally clear that the county treasurer is not bound to pay them unless he has the funds, and that no action will lie against him unless he refuses to disburse moneys actually in his hands for that purpose. An examination of the statute, we think, demonstrate that there is an obligation on the supervisors representing the county that they can only discharge by an assessment and collection of the tax. By section one of the drain law of 1871 the board of supervisors of each county are authorized to appoint one county drain commissioner, who is required by section three to execute the

duties of his office and the resolutions and orders of the board of supervisors. He is bound to keep a full record of his official acts in a book to be furnished by the county, to draw all proper orders on each drain fund, to report to the board of supervisors his action in relation to each drain and file the same with the clerk. Orders drawn by him must be countersigned by the chairman and clerk of the board. By section four, on application to him by ten or more owners of land in each township he is required to make examination by surveys and to determine the route of any drain they may require, and may have the assist-
38 ance (section six) of a court of record for the appointment of special commissioners to examine the property and the necessity for the construction of such drain. By section eleven he shall make a full report of all his doings and present the same to the board of supervisors at their next annual meeting. This board shall charge the apportioned sum against each township and direct the supervisor of each township to levy the same upon the several parcels of land benefited by the drain. By section twelve the county treasurer is charged with the duty of returning all lands upon which a tax shall be levied and not paid to the auditor general, and the same shall be advertised and sold, and if bid off to the State the State treasurer shall pay over to the county treasurer the amount of the taxes. By section fifteen whenever such tax shall be set aside by any court of competent jurisdiction it shall be lawful for the supervisor to reassess such tax on the same land where such drain has been made, and in case of any mistake or misapportionment of taxes the board of supervisors, upon the recommendation of the drain commissioner or upon a review before them had by appeal from the action of the drain commissioner, may reassess upon the various lands or portions of lands such amount of drainage taxes as may be necessary to correct such mistake or misapportionment. By section seventeen no money shall be paid by any county treasurer except on a warrant drawn by the commissioner and countersigned by the chairman and clerk of the board of supervisors, and then only from the particular fund provided for each ditch. If there be no funds in his hands the county treasurer must endorse the date of the presentation of the orders with his signature thereto, and his orders shall draw interest from and after such presentation and endorsement. Sec. 19. By
39 section twenty-four the board of supervisors has full power and authority to control the action of the commissioner, and may order reassessment of the drain tax or any portion thereof to correct errors, and may make any other order in relation to such ditches or drains as may be necessary. By section thirty-three the most ample powers are conferred upon courts to make such orders as shall be just and equitable, and may order such tax to remain on the roll for collection, or order the same to be levied, or may enjoin the same, or may order the whole or such part thereof as may be just and equitable to be refunded.

It is evident that under this act most ample powers are conferred on the board of supervisors with regard to the assessment and col-

lection of these taxes, and in case of any dereliction of duties on their part there ought to be a remedy against the corporation of which they are the authorized expression and agent. As above observed, the property remedy in the State court is by writ of mandamus. As the court is incompetent, in the first instance, to afford this relief, we think an action may be brought against the county and the collection of the judgment by the same process of mandamus that would be resorted to if the proceedings had been instituted in the State court.

My only doubt in this connection — whether the declaration should not count upon the failure of the board of supervisors to take the proper proceedings for the levy and collection of this tax. The State courts have repeatedly held that no action as for a debt will lie against the municipality upon these warrants. Goodrich *vs.* Detroit, 12 Mich., 279; Second National Bank *vs.* Lansing, 25 Mich., 207; 1 Met. (Ky.), 339; 16 Wis., 271; 18 Do., 209-232; 28 Iowa, 575; but may not an obligation to pay these orders arise
40 from a failure to collect them from the land?

2. The second defence in this case is that these orders are not negotiable, and hence that plaintiff is not authorized to bring suit upon the same in this court. By the act of 1887 this court cannot take cognizance of any suit, except upon foreign bills of exchange, to recover the contents of any promissory note or other chose in action in favor of any assignee or of any subsequent holder if such instrument be payable to bearer and be not made by any corporation, unless such suit might have been prosecuted in such court to recover said contents if no assignment or transfer had been made. There is doubt that under the case of Mayor *vs.* Ray, 19 Wall., 468, instruments of this description may be transferred from hand to hand, but that they are not commercial paper in the sense of creating an absolute obligation to pay for them, free from legal and equitable defences, and that the holder takes them subject to such defences.

We understand, however, that they are negotiable instruments in the sense that suit may be brought upon them by the holder, though they have no validity, unless issued for the purpose authorized by law, and that, while *prima facie* valid, they may be shown to have been irregularly or fraudulently issued.

Dist. of Columbia *vs.* Cornell, 130 U. S., 655.
Wall *vs.* Co. of Monroe, 103 U. S., 74.
Clayborne Co. *vs.* Brooks, 11 U. S., 408.
Kelly *v.* The Mayor, 4 Hill, 263.

They were also held to be negotiable instruments in Bull *vs.* Sims, 23 N. Y., 570, and in Brill *vs.* Tuttle, 81 N. Y., 454, it was
41 said that they operated as an assignment of so much of the fund as the amount of the order. The act of 1887 does no seem to be limited to negotiable paper, but to extend to any chose in action if the instrument be payable to bearer and be made by a corporation or in behalf of a corporation; but, even assuming that it is limited to negotiable paper, we think that these instruments

so far participate of that character that suit may be brought upon them by any holder.

3. The third defence is that the plaintiff is bound to prove the proceedings for the assessment and collection of the tax to have been regular. Undoubtedly the regularity of such proceedings may be examined on certiorari to the drain commissioner.

Kroop *vs.* Forman, 31 Mich., 144.

Whiteford Township *vs.* Probate Judge, 53 Mich.

Or upon a bill filed to restrain the collection of the tax. Frost *vs.* Leatherman, 55 Mich., 33. But in actions upon orders drawn upon the county treasurer to pay for services rendered, it is said by the Supreme Court, in Wall *vs.* Co. of Monroe, 103 U. S., 77, the orders establish *prima facie* the validity of the claims allowed and authorize their payment. It is further said that the warrants, being in form negotiable, are transferable by delivery so far as to authorize the holder to demand payment of them and to maintain in his own name an action upon them, but they are not negotiable in the sense of the law merchant, so that when held by a *bona fide* purchaser evidence of their invalidity or defences available against the original payee would be excluded. The transferee takes them subject to all legal and equitable defences which existed to them in the hands of such payee.

42 4. It is said, however, that the case of Brownell *vs.* Gratiot Supervisors, 49 Mich., 414, is conclusive against the right of recovery in this case. That was an application for a writ of mandamus for the payment of these very orders. The court held that the relator, Eliza W. Brownell, had not shown herself to be the holder and legal owner of these orders, and that she was not entitled to the writ unless her right to such orders was either admitted or proved. It was further intimated in that case that Scriven, the original holder of these orders, could not have recovery upon them because he, having purchased certain State lands, against which a portion of these taxes had been assessed, had filed a bill in chancery in the circuit court for Gratiot county against the commissioner of the State land office and procured a decree declaring the assessment on such lands to be legal and void, — in pursuance of this decree these lands were patented by the State to Scriven without the payment of said taxes or any part thereof. It was said that under the circumstances neither Scriven nor any person claiming under him could with a very good grace ask that a discretionary writ should be issued as prayed for in that case. We do not understand, however, what there is in this opinion to create an estoppel. We are not informed of the grounds on which the court set aside these taxes, nor do we understand why the board of supervisors had not ample power under the act to reassess these taxes upon the same or other lands benefited by the drain. We know of no reason why a paving contractor, for instance, owning a lot upon a certain street which he has paved may not institute a bill to have the taxes assessed upon such lot declared to be illegal,

43 in which case we understand the tax would either be reas-

sessed or assessed upon the other lots upon the same street. To say that he is thereby debarred from recovering the amount of his paving contract is practically to say that he must pay a tax himself which the court has declared to be illegal or improperly assessed. While we should desire to give full force to the opinion of the Supreme Court in this case, the point really decided was that the relator had not made title to these orders. There was no such construction given to the drain law as would be binding upon this court, nor are there any reasons given in this opinion why a holder of these orders might not maintain suit upon them. It was said to be doubtful whether under this legislation it was contemplated that parties could purchase State lands against which taxes had been entered up and having the same set aside, but that is precisely what Scriven appears to have done in this case. We do not understand the court to decide that an action could not be maintained against the count upon these orders, but only in its discretion it would refuse a writ of mandamus. We are not fully persuaded that the reason stated in the latter part of this opinion for denying the writ is a sound one, but, in any event, we hold that it is not applicable to this case.

We do not find it necessary to discuss at length the question as to when the statute of limitations begins to run upon these orders, because as to all but one of them it is admitted that a payment was made in 1885, which, upon any construction, would take them out of the statute. Upon the remaining order it is quite evident that the statute is a complete defence. I shall therefore instruct the jury to render a verdict for the plaintiff in this case for the sum of $4,847.12 and interest from Nov. 7th.

44 *Judgment.*

At a session of the circuit court of the United States for the eastern district of Michigan, continued and held, pursuant to adjournment, at the district court room, in the city of Detroit, on Wednesday, the twenty-third day of July, in the year one thousand eight hundred and ninety.

Present: The Honorable Henry B. Brown, district judge.

HENRY M. AYLESWORTH
vs.
COUNTY OF GRATIOT } # 7705.

The jury by whom the issue in this cause was tried having, on the seventh day of November, 1889, rendered a verdict in favor of said plaintiff and against said defendant for the sum of four thousand eight hundred and sixty-eight dollars and seventy-four cents damages, now, on motion of Marston, Cowles & Jerome, attorneys for said plaintiff, it is by the court now here considered that the said plaintiff do recover against the said defendant his damages aforesaid, with interest thereon to this day, $241.28, amounting in all to the sum of five thousand and eighty-eight dollars and forty cents, to-

gether with his costs and charges by him about his suit in this behalf expended, to be taxed, and that said plaintiff have execution therefor.

45 *Order Setting Aside Old Judgment and Entering New One.*

At a session of the circuit court of the United States for the eastern district of Michigan, continued and held, pursuant to adjournment, at the district court room, in the city of Detroit, on Tuesday, the twenty-sixth day of August, in the year one thousand eight hundred and ninety.

Present: The Honorable Henry B. Brown, district judge.

HENRY M. AYLESWORTH
vs.
THE COUNTY OF GRATIOT. } # 7705.

On motion of Marston, Cowles & Jerome, attorneys for the plaintiff, it is ordered that the judgment entered in this cause July 23rd, 1890, be, and the same — hereby, vacated and set aside and in place thereof judgment be entered in favor of plaintiff in words and figures following, to wit:

HENRY M. AYLESWORTH
vs.
THE COUNTY OF GRATIOT. } # 7705.

The jury by whom the issue joined in this cause was tried having rendered a verdict therein in favor of the plaintiff and
46 against the defendant, and having assessed the damages of the said plaintiff on occasion of the premises at the sum of forty-eight hundred and sixty-eight dollars and seventy-four cents ($4,868.74) over and above his costs and charges by him about his suit in that behalf expended, therefore it is considered that the said plaintiff do recover against the said defendant his damages by the jurors aforesaid in form assessed and the interest thereon from the rendition of said verdict, November 30th, 1889, amounting to the sum of two hundred and fifty-one dollars and eighty-two cents, in all, on this day, five thousand one hundred and twenty dollars and fifty-six cents, together with his costs and charges to be taxed, and that a writ of mandamus shall issue to the board of supervisors of said county directing that the amount of said damages, interest, cost, and charges shall be levied and assessed as follows: Twenty-nine hundred and forty-one dollars and ninety-three cents (2,941.93) on lands in the township of Newark, in said county, benefited by the Mack & Arcada ditch; six hundred and eighty dollars and twenty-four cents ($680.24) on lands in the township of Arcada, in said county, benefited by the Newark and Arcada ditch, and twelve hundred and forty-six dollars and fifty-seven cents ($1,246.57) on lands in the township of New Haven, in said county, benefited by the Newark & New Haven ditch. As to the interest, costs, and charges, the amount shall be levied and assessed on said several classes of

lands in the same proportion as said damages are levied and assessed according to the statute in such case made and provided, and not otherwise.

47 *Stipulation Extending Time to Settle Bill of Exceptions.*

The United States Circuit Court for the Eastern District of Michigan.

HENRY M. AYLESWORTH
vs.
THE COUNTY OF GRATIOT.

It is hereby stipulated and agreed that defendant may have thirty days from the first day of the next November term of said court to settle a bill of exceptions in above-entitled cause.

MARSTON, COWLES & JEROME,
Attorneys for Plaintiff.
C. J. WILLETT, *Att'y for Defendant.*

Filed Nov. 5th, 1890.
WALTER S. HARSHA, *Clerk.*

48 *Stipulation.*

The Circuit Court of the United States for the Eastern District of Michigan.

HENRY M. AYLESWORTH
vs.
THE COUNTY OF GRATIOT.

It is hereby stipulated that time for settling a bill of exceptions in said cause is hereby extended to the first day of the next term.

It is further stipulated that if on or before Thursday, the sixteenth day of October, 1890, defendant wishes to show cause for a stay or modification of any writ of mandamus issued in said cause, the privilege of so doing is hereby reserved *to* the same manner as if done before the issuing of said writ.

Dated October 2nd, 1890.

MARSTON, COWLES & JEROME,
Attorneys for Plaintiff.
C. J. WILLETT, *Attorney for Defendant.*

Filed October 2nd, 1890.
WALTER S. HARSHA, *Clerk.*

49 *Bill of Exceptions.*

The Circuit Court of the United States for the Eastern District of Michigan.

HENRY M. AYLESWORTH
vs.
THE COUNTY OF GRATIOT.

At a session of said court held at the district court room, in the city of Detroit, on the seventh day of November, 1889, before the judge of said court and a jury, this cause came on to be tried upon the issue joined between the parties, and upon the trial of the issue aforesaid the counsel for said plaintiff, to maintain and prove the issue on his part, offers in evidence the following orders counted upon in plaintiff's declaration:

No. 89. ITHACA, MICH., *November 2nd*, 1871.

County treasurer, Gratiot county,

Pay to William Bryne or bearer five hundred and sixty-eight dollars out of the drain tax assessed in the township of Newark for construction of Newark and Arcada ditch, in said township. Act No. 169, Laws of 1871.

$568.00. PHILIP BURLINGAME,
Drain Commissioner of Gratiot County.

50 Countersigned:
J. C. GIDDINGS,
Chairman of the Board of Supervisors.
N. CHURCH, *Clerk.*

(Endorsed:) Presented for payment this 6th day of November, A. D. 1871. Wm. S. Turck, treasurer of Gratiot Co., Mich. Paid March 31st, 1883, on the within order two hundred dollars ($200.00). S. B. Heverloo, Co. treasurer. Rec'd March 31st, '83, of said Co. treasurer the above ($200.00) as the agent of Elixa W. Brownell, of Niagara Co., N. Y. W. E. Winton.

No. 257. ITHACA, MICH., *Nov. 7th*, 1872.

County treasurer, Gratiot county,

Pay to John Scriven or bearer three hundred and seventy-six dollars out of the drain tax assessed in the township of Arcada for construction of Newark and Arcada ditch, in said township. Act No. 169, Laws of 1871.

$376.00. D. W. ALTENBURG,
Drain Commissioner of Gratiot County.

Countersigned:
H. T. BARNABY,
Chairman of the Board of Supervisors.
N. CHURCH, *Clerk.*

51 Endorsed: Presented for payment this 16th day of November, A. D. 1872. W. S. Turck, treasurer of Gratiot Co., Mich. Paid March 31, 1883, on the within order one hundred forty-eight $\frac{46}{100}$ dollars. S. B. Heverlo, Co. treasurer. $148.46. Received March 31, '83, of said Co. treasurer the above $148.46 as the agent of Eliza W. Brownell, of Niagara Co., N. Y. W. E. Winton.

No. 368. ITHACA, MICH., *Oct. 24th*, 1873.

County treasurer, Gratiot county,

Pay to John Scriven or bearer five hundred and ten and $\frac{60}{100}$ dollars out of the drain tax assessed in the township of Newark. Act No. 169, Laws of 1871.

$510.60. D. W. ALTENBURG,
County Drain Commissioner of Gratiot County.

Countersigned:
W. S. EVEREST,
Chairman of the Board of Supervisors.
W. B. SCATTERGOOD, *Dep'y Clerk.*

Endorsed: Presented for payment this 25th day of October, A. D. 1873. S. W. Ambler, dep'y treasurer for Gratiot Co., Mich.
52 Paid on the within, March 31, 1883, two hundred dollars ($200.00). S. B. Heverlo, Co. treasurer. Rec'd March 31, '83, of said Co. treasurer the foregoing $200.00 as the agent of Eliza W. Brownell, of Niagara Co., N. Y. W. E. Winton.

No. 370. ITHACA, MICH., *Oct.* 24, 1873.

County treasurer, Gratiot county,

Pay to John Scriven or bearer five hundred and forty-seven $\frac{20}{100}$ dollars out of the drain tax assessed in the township of Newark for construction of Newark & Arcada ditch. Act No. 169, Laws of 1871.

$547.20. D. W. ALTENBURG,
County Drain Commissioner, Gratiot County.

Countersigned:
W. S. EVEREST,
Chairman of the Board of Supervisors.
W. B. SCATTERGOOD, *Dep'y Clerk.*

Endorsed: Presented for payment this 25th day of October, A.D. 1873. S. W. Ambler, dep'y treasurer, Gratiot Co., Mich. Paid March 31, 1883, on the within order two hundred ($200.00) dollars. S. B. Heverlo, Co. treasurer. Rec'd March 31st, '83, of said Co. treasurer, the foregoing $200.00 as the agent of Eliza W. Brownell, of Niagara Co., N. Y. W. E. Winton.

53 No. 373. ITHACA, MICH., *Oct.* 24, 1873.

County treasurer, Gratiot county,

Pay to John Scriven or bearer six hundred and seventy-eight and $\frac{93}{100}$ dollars out of the drain tax assessed in the township of New Haven for construction of the Newark & New Haven ditch. Act No. 169, Laws of 1871.

$678.93. D. W. ALTENBURG,
County Drain Commissioner of Gratiot County.

Countersigned:
W. S. EVEREST,
Chairman of the Board of Supervisors.
W. B. SCATTERGOOD, *Dep'y Clerk.*

Endorsed: Presented for payment this 25th day of October, A. D. 1873. S. W. Ambler, dep. treasurer of Gratiot Co., Mich. Paid March 31, 1883, on the within order two hundred dollars ($200.00). S. B. Heverlo, Co. treasurer. Rec'd March 31st, '83, of said Co. treasurer the above $200.00 as the agent of Eliza W. Brownell, of Niagara Co., N. Y. W. E. Winton.

In connection with said offer the endorsements of March 31st, 1883, were duly proven as regards each order and the facts that all moneys in the funds to pay said orders *was* at that time withdrawn.

The receptions of these orders in evidence was duly objected to by defendant's counsel as incompetent and immaterial upon the following grounds:

Under the allegations of the declaration a contract between the defendant and some party must be shown.

54 That they were in no sense the obligations of the defendant; that misappropriation of the funds must be shown; that the orders were not negotiable; that they came within the statute of limitations.

On consideration the orders were admitted in evidence by the court, and defendant's counsel duly excepted.

The am't due upon said orders, as claimed and shown by plaintiff's counsel upon the face of the same and less endorsements, was the sum of $4,847.12. Thereupon the bill, answer, and decree in the case of John Scriven *vs.* James Neasmith, com'r of the State land office; The County of Gratiot, and Daniel W. Altenburg, drain com'r, were offered by defendant's counsel and received in evidence, and it was conceded that the Gratiot circuit court had jurisdiction of the case.

Thereupon the defendant's counsel showed, further, that the orders sued upon in this case were the same which constituted the cause of action in Eliza W. Brownell *vs.* The Board of Supervisors of Gratiot County, reported in the 49th Mich. Reports, on page 414.

And the above is all the material evidence introduced in said cause; and afterward, on the 30th day of November, A. D. 1889,

the judges of said court did deliver the following opinion in said cause and charge to the jury:

BROWN, *J.:*

While this is nominally an action to recover the amount of those orders from the county, the real object is to procure a writ of mandamus for the collection of this tax from the property benefited by the drain.

55 Several defenses are interposed, which I will proceed to consider in their order:

1. That the orders created no obligation *obligation* against the county.

If by this it is intended merely to urge that the orders created no debt against the county which, as a municipal corporation, it is bound to pay the position taken is correct.

It is well settled that where public improvements are by law to be made the expense of the adjoining property no charge against the corporation is created and i-s only duty is to take the necessary and legal steps to collect the assessment and to pay it to the parties justly entitled thereto. Thus it was held in the case of Lake *vs.* Trustees of Williamsburg, 4 Denio, 520, in an action upon an order given by the president of a village upon the treasurer to pay the contractor a certain sum out of particular funds that the corporation was the agent or instrument of, the landholder having an interest in the matter to ascertain how much each one ought to pay, and another to receive and collect the money from those who were benefited and see that it was properly applied to the particular object, and that this was the extent of its duty.

It was held that the plaintiff could not recover generally against the corporation as for a debt, and it was intimated that the plaintiffs had a remedy by mandamus or by an action on the case against the trustees for neglect of duty. This is also the intimation of the Supreme Court in the case of Ogden *vs.* County of Daviess, 102 United States, 634, and I believe that the authorities are uni-

56 form to the effect that no action will lie against the county upon these obligations as for a debt chargeable against it. Goodrich *v.* Detroit, 12 Mich., 279; Second National Bank of Lansing, 207. The proper remedy in this class of cases in the State courts is by writ of mandamus to compel the assessments and collection of the tax by the officers charged with that duty and payment of the same to the party entitled thereto.

As a petition for a writ of mandamus in the Federal court will not be entertained as an original proceeding, it was at one time supposed that no action of any kind would lie against a municipality.

In the case of Boro *vs.* Phillips County, 4 Dillon, 216, it was held that the failure or refusal of the county to discharge its duty in such cases did not make it liable to a general judgment for the obligations of the particular district, and could not be made the foundation of an action against the county for a money judgment.

This may be entirely true, and yet it does not follow that there

is no remedy in the Federal court where the plaintiff is entitled to sue therein by reason of his citizenship.

The general rule is believed to be without exception that where *that where* the plaintiff is otherwise entitled to relief in this court he will not be debarred therefrom by reason of the fact that his remedy in the State court upon the same cause of action would be of a character which we are not entitled to administer here.

Hence it was held by Judge Dillon, in a case of Jordan *vs.* Cass County, 3 Dillon, 185, that the holder of county bonds issued
57 by county court on behalf of the township voting aid to a railway might sue the county in the Federal court and recover judgment thereon, although such judgment could not be enforced against the county or its property or the tax-payers of the county at large, but only by mandamus to the county court to compel the levy and collection of the special tax according to the statute.

This is believed to be the earliest case upon the subject, and the opinion is a very interesting and instructive one. This case was approved in The County of Cass *vs.* Johnson, 95 U. S., 360, and was applied in the case of Davenport *vs.* The County of Dodge, 105 U. S., 237, to bonds issued to county commissioner on behalf of a precinct which had no corporate existence and could not contract or be contracted with. The court considered the bonds in this case as special bonds which the county commissioners were to issue for the precinct, and that they were in legal effect the special bonds of the county, payable out of a special fund to be raised in a special way. Similar ruling was made in the case of Blair *vs.* Cumming County, 111 U. S., 363. This case differs from the others in the fact that the bonds contained no promise by the county to pay, but a promise which had no separate corporate existence. Notwithstanding that, the county was held liable to a performance of the obligation.

As the authority of the drain commissioner to draw these orders is unquestionable, it is evident that there *we* must be a remedy in favor of the payee or holder against some one for payment. It is an axiom of the law that for every wrong there is a remedy.
58 It is evident, however, there can be no remedy against the commissioner, as he has no corporate powers, and as he is required by law to draw these orders upon the county treasurer in behalf of the contractor, but has no power to enforce the collection of the tax or to provide in any other way for the payment, it is equally clear that the county treasurer is not bound to pay them unless he has the funds, and that no action will lie against him unless he refuses to disburse monies actually in his hands for that purpose. An examination of the statute, we think, demonstrates that there is an obligation on the supervisors representing the county that they can only discharge by an assessment and collection of the tax. By section one of the drain law of 1871 the board of supervisors of each county are authorized to appoint one county drain commissioner who is required by section three to execute the duties of his office and the resolutions and orders of the board of supervisors; he is

bound to keep a full record of his official acts in a book to be furnished by the county, to draw all proper orders on each drain fund, to report to the board of supervisors his action in relation to each drain, and file the same with the clerk.

Orders drawn by him must be countersigned by the chairman and clerk of the board. By section four, on application to him by ten or more owners of land in each township he is required to make examination by surveys and to determine the route of any drain they may require, and may have the assistance (section six) of a court of record for the appointment of special commissioners to ex-
59 amine the property, and the necessity for the construction of such drain. By section eleven he shall make a full report of all his doings and present the same to the board of supervisors at their next annual meeting. This board shall charge the apportioned sum against each township and direct the supervisor of each township to levy the same upon the several parcels of land benefited by the drain. By section twelve the county treasurer is charged with the duty of returning all lands upon which a tax shall be levied and not paid to the auditor general, and the same shall be advertised and sold, and if bid of- to the State the State treasurer shall pay over to the county treasurer the amount of the taxes. By section 15 whenever such tax shall be set aside by any court of competent jurisdiction it shall be lawful for the supervisor to reassess such tax on the same land where such drain has been made, and in case of any mistake or misapportionment of taxes the board of supervisors, upon the recommendation of the drain commissioner or upon a review before them had by appeal from the action *from* the drain commissioner, may reassess upon the various lands or portion of lands such amount of drainage taxes as may be necessary to correct such mistake or misapportionment. By section seventeen no money shall be paid by any county treasurer except on a warrant drawn by the commissioner and countersigned by the chairman and clerk of the board of supervisors, and then only from the particular fund provided for each ditch. If there be no funds in his hands the county treasurer must endorse the date of the presentation of the orders with his signature thereto, and his orders shall draw interest from and after such presentation and endorsement. Sec. 19.

60 By section twenty-four the board of supervisors has full power and authority to control the action of the commissioner, and may order reassessment of the drain tax or any portion thereof, to correct errors, and may make any other order in relation to such ditches or drains as may be necessary. By section thirty-three the most ample powers are conferred upon courts to make such order as shall be just and equitable and may order such tax to remain on the roll for collection or order the same to be levied or may enjoin the same or may order the whole or such part thereof as may be just and equitable to be refunded.

It is evident that under this act most ample powers are conferred on the board of supervisors with regard to the assessment and collection of these taxes, and in case of any dereliction of duties on

their part there ought to be a remedy against the corporation of which they are the authorized expression and agent. As before observed, the proper remedy in the State court is by writ of mandamus; as the court is incompetent, in the first instance, to afford this relief, we think an action may be brought against the county and the collection of the judgment enforced by the same process of mandamus that would be resorted to if the proceedings had been instituted in the State court. My only doubt in this connection — whether the declaration should not count upon the failure of the board of supervisors to take the proper proceedings for the levy and collection of this tax.

The State courts have repeatedly held that no action as for a debt will lie against the municipality upon these warrants. Goodrich *v.* Detroit, 12 Mich., 279; Second Nat'l Bank *v.* Lansing, 25 Mich., 207;
1 Met. (Ky.), 339; 16 Wis., 271; 18 do., 209–232; 28 Iowa,
61 575. But may not an obligation to pay these orders arise from a failure to collect them from the land?

The second defense in this case is that these orders are not negotiable, and hence that plaintiff is not authorized to bring suit upon the same in this court. By an act of 1887 this court cannot take cognizance of any suit, except upon foreign bills of exchange, to recover the contents of any promissory note or other chose in action in favor of any assignee or of any subsequent holder, if such instrument be payable to bearer and be not made by any corporation, unless such suit might have been prosecuted in such court to recover said contents if no assignment or transfer had been made. There is no doubt that under the case of Mayor *vs.* Ray, 19 Wall., 468, instruments of this description may be transferred from hand to hand, but that they are not commercial paper in the sense of creating an absolute obligation to pay for them, free from legal and equitable defenses, and that the holder takes them subject to such defenses. We understand, however, that they are negotiable instruments in the sense that suit may be brought upon them by the holder, though they have no validity unless issued for the purpose authorized by law, and that while *prima facie* valid they may be shown to have been irregularly or fraudulently issued.

Dist. of Columbia *vs.* Cornell, 130 U. S., 655.
Wall *vs.* Co. of Monroe, 103 U. S., 74.
Clayborne Co. *vs.* Brooks, 11 U. S., 408.
Kelly *vs.* The Mayor, 4 Hill, 263.

They were also held to be negotiable instruments in Bull
62 *vs.* Sims, 23 N. Y., 570, and in Brill *vs.* Tuttle, 81 N. Y., 454. It was said that they operated as an assignment of so much of the funds as the amount of the order. The act of 1887 does not seem to be limited to negotiable paper, but to extend to any chose in action if the instrument be payable to bearer and be made by a corporation or in behalf of a corporation; but even assuming that it is limited to negotiable paper we think that these instruments so far participate of that character that suit may be brought upon them by any holder.

The third defense is that the plaintiff is bound to prove the proceedings for the assessment and collection of the tax to have been regular. Undoubtedly the regularity of such proceedings may be examined — certiorari to the drain commissioner.

(Kroop *vs.* Forman, 31 Mich., 144.)

(Whiteford Township *vs.* Probate Judge, 53 Mich., 130.)

or upon a bill filed to restrain the collection of the tax (Frost *vs.* Leatherman, 55 Mich., 33); but in action upon orders drawn upon the county treasurer to apply for services rendered it is said by the Supreme Court, in Wall *vs.* Co. of Monroe, 103 U. S., 77, the orders establish *prima facie* the validity of the claims allowed and authorize their payment. It is further said that the warrants, being in form negotiable, are transferable by delivery so far as to authorize the holder to demand payment of them and to maintain in his own name an action upon them; but they are not negotiable in the sense of the law merchant, so that when held by a *bona fide* purchaser evidence of their validity or defenses available against the original payee would be excluded; the transferee takes them subject
63 to all legal and equitable defenses which existed to them in the hands of such payee.

It is said, however, that the case of Brownell *vs.* Gratiot Supervisors, 49 Mich., 414, is conclusive against the right of recovery in this case. That was an application for a writ of mandamus for the payment of these very orders. The court held that the relator, Eliza W. Brownell, had not shown herself to be the holder and legal owner of these orders, and that she was not entitled to the writ unless her right to such orders was either admitted or proved. It was further intimated in that case that Scriven, the original owner of these orders, could not have recovery upon them because he, having purchased certain State lands against which a portion of these taxes had been assessed, had filed a bill in chancery in the circuit court for Gratiot county against the commissioner of the State land office and procured a decree declaring the assessment on such lands to be allegal and void. In pursuance of this decree these lands were patented by the State to Scriven without the payment of said taxes or any part thereof. It was said that under these circumstances neither Scriven nor any person claiming under him could with a very good grace ask that a discretionary writ should be issued as prayed for in that case. We do not understand, however, what there is in this opinion to create an estoppel. We are not informed of the grounds on which the court set aside these taxes, nor do we understand why the board of supervisors have not ample power under the act to reassess those taxes upon the same or other lands benefited by the drain. We know of no reason why a paving contractor, for instance, owning a lot upon a certain street which he has paved may
64 not institute a bill to have the taxes assessed upon such lots declared to be illegal, in which case we understand the tax would either be reassessed or assessed upon the other lots upon the same street. To say that he is thereby debarred from recovering the amount of his paving contract is practically to say that he must pay

a tax himself which the court has declared to be illegal or improperly assessed.

While we should desire to give full force to the opinion of the Supreme Court in this case, the point really decided was that the relator had not made title to these orders.

There was no such construction given to the drain law as would be binding upon this court, nor are there any reasons given in this opinion why a holder of these orders might not maintain suit upon them. It was said to be doubtful whether under this legislation it was contemplated that parties could purchase State lands against which taxes have been entered up and have the same set aside; but that is precisely what Scriven appears to have done in this case. We do not understand the court to decide that an action could not be maintained against the county upon these orders, but only in its discretion it would refuse a writ of mandamus. We are not fully persuaded that the reasons stated in the lat-er part of this opinion for denying the writ is a sound one, but in any event we hold that it is not applicable to this case.

We do not find it necessary to discuss at length the question as to when the statute of limitation begins to run upon these orders, because as to all but one of them it is admitted that a pay-
65 ment was made in 1883, which, upon any construction, would take them out of the statute. Upon the remaining order, it is quite evident that the statute is a complete defense. I shall therefor-instruct the jury to render a verdict for the plaintiff in this case for the sum of $4,847.12, and interest from Nov. 7th, in all $4,868.74; to which said opinion and charge exception was duly taken by defendant's counsel.

And because said matters do not appear of record in said cause the judge aforesaid, at the request of counsel for defendant, has signed this bill of exceptions, pursuant to the statute in such case made and provided, this 29th day of November, A. D. 1890.

HENRY B. BROWN, [L. S.]
Dist. Judge.

66 *Bond on Writ of Error.*

Know all men by these presents that we, M. McVeigh, W. Kuhlman, B. Sharp, S. Hile, Chas. Shafer, L. J. Fuller, T. Lewis, W. C. Stone, N. B. Johnson, J. F. Innes, W. A. Furman, J. S. Parker, H. C. Burlingame, all of the county of Gratiot, State of Michigan, are held and firmly bound unto Henry M. Aylesworth, of New York State, in the sum of ten thousand five hundred dollars, lawful money, to be paid to the said Henry M. Aylesworth, his executors, administrators, or assigns; for which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, firmly by these presents.

Sealed with our seals and dated the 13th day of October, A. D. 1890.

Whereas judgment has been rendered in the circuit court of the United States for the eastern district of Michigan in favor of said Henry M. Aylesworth and against the county of Gratiot for five

thousand one hundred and twenty dollars and fifty-six cents, damages, and costs, taxed at forty-five dollars and twenty-seven cents, which is to be collected by assessment of tax upon certain lands in Arcada, Newark, and New Haven townships, in said county, in which judgment and proceedings the said county of Gratiot complains that there is error in substance and, to be relieved therefrom, has obtained a writ of error to remove the same to the Supreme Court of the United States, to the end that said errors may be corrected:

Now, therefore, the condition of this obligation is such that if the said county of Gratiot shall prosecute its said writ of error *and* effect and *should* pay and satisfy such judgment as shall be ren-
67 dered against it upon said writ of error in said Supreme Court, then this obligation to be void; otherwise to remain in full force and effect.

WARNER C. STONE.	[L. S.]
LOVELL J. FULLER.	[L. S.]
JOHN S. PARKER.	[L. S.]
HENRY C. BURLINGAME.	[L. S.]
WILMARTH A. FURMAN.	[L. S.]
JOHN F. INNES.	[L. S.]
ARTHUR W. LEWIS.	[L. S.]
SOLOMON HILE.	[L. S.]
MILTON McVEIGH.	[L. S.]
THOMAS LEWIS.	[L. S.]
CHARLES SHAFER.	[L. S.]
BENJAMIN SHARP.	[L. S.]
WILLIAM KUHLMAN.	[L. S]
NATHANIEL B. JOHNSON.	[L. S.]

STATE OF MICHIGAN, } ss:
County of Gratiot, }

Warner C. Stone	$100 00
Lovell J. Fuller	4,000 00
John S. Parker	1,000 00
Henry C. Burlingame	500 00
Wilmarth A. Furman	1,000 00
John F. Innes	500 00
Arthur W. Lewis	1,000 00
Solomon Hile	1,000 00
Milton McVeigh	300 00
Thomas Lewis	1,000 00
Charles Shafer	1,000 00
Benjamin Sharp	500 00
William Kuhlman	500 00
Nathaniel B. Johnson	500 00

68 personally came before me this 13th day of October, A. D. 1890, and, being duly sworn each for himself, deposes and

says that he is worth over and above legal exemptions and liabilities the sum set opposite his respective name above.

N. C. R. SALTER,
Notary Public, Gratiot Co., Michigan.

Approved:
H. B. BROWN.

69 United States Circuit Court, Eastern District of Michigan.

HENRY M. AYLESWORTH
vs.
COUNTY OF GRATIOT.

I, Walter S. Harsha, clerk of the circuit court of the United States for the eastern district of Michigan, do hereby certify and return to the writ of error sued out by The County of Gratiot, defendant in the above-entitled cause, that the foregoing is a true copy of all papers filed and proceedings had in said cause as appears of record in my office; that I have compared the same with the original and it is a true and correct transcript therefrom and of the whole thereof.

In testimony whereof I have hereunto subscribed my name and affixed the seal of said court, at Detroit, this twentieth day of May, in the year of our Lord one thousand eight hundred and ninety-one, and of the Independence of the United States of America the one hundred and fifteenth.

Seal of the Circuit Court, Eastern District of Michigan.

WALTER S. HARSHA, *Clerk.*

70 Supreme Court of the United States.

THE COUNTY OF GRATIOT, Plaintiff in Error,
vs.
HENRY M. AYLESWORTH.

And now comes the plaintiff in error, by Benton Hanchett, its attorney, and says that in the record and proceedings in said cause, and in the judgment therein, there is manifest error in this, to wit:

First. The said circuit judge erred in instructing the jury to render a verdict for the plaintiff when he should have charged them to find for the defendant.

Second. The said circuit judge erred in admitting in evidence the orders sued upon against objection of defendant that they were in no sense obligations of defendant county.

Third. The said circuit judge erred in admitting the orders sued upon in evidence against objection of defendant, because they were not such negotiable orders of defendant as would give the court jurisdiction under statute of 1887.

Fourth. Said judge erred in his charge to the jury on point raised in the third assignment of error.

Fifth. Said circuit judge erred in holding that the statute of limitations was not a good defence to said orders.

Sixth. Said circuit judge erred in holding that it was not necessary to show a misappropriation of funds before recovery could be had against the county defendant.

Seventh. Said judge erred in holding that a sufficient cause of action was set forth in the declaration.

Eighth. The court erred in allowing plaintiff to amend declaration in form at the trial. The whole record will be needed for the consideration of the foregoing assignments.

BENTON HANCHETT,
Attorney for Plaintiff in Error.

Endorsed on cover: Case No. 14,842. E. Michigan C. C. U. S. No. 292. The County of Gratiot, plaintiff in error, *vs.* Henry M. Aylesworth. Filed September 16, 1891.

(14,842.)

Supreme Court of the United States.

OCTOBER TERM, 1894.

No. 292.

THE COUNTY OF GRATIOT, Plaintiff in Error,

vs.

HENRY M. AYLESWORTH.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF MICHIGAN.

BRIEF FOR PLAINTIFF IN ERROR.

This is an action *of trespass on the case upon promises*, commenced by summons duly issued from the Circuit Court of the United States for the Eastern District of Michigan, on the 29th day of March, *A. D.* 1889, wherein Henry M. Aylesworth, alleged to be a citizen and resident of the state of New York, is named as plaintiff; and the county of Gratiot, alleged to be a municipal corporation organized under the laws of the state of Michigan, citizen of the state and resident of the Eastern District, is named as defendant. This summons was served upon the clerk of the county, defendant, on March 30th, 1889. [Record page 3.]

In due time defendant appeared, and plaintiff filed a declaration, following the allegations of the summons, and, in the common form used in Michigan in cases of assumpsit, counting specially upon certain orders of which the following is an illustration.

No. 370. ITHACA, MICH., Oct. 24th, 1873.

County Treasurer Gratiot County:

Pay to John Scriven, or bearer, five hundred and forty-seven and 20-100 dollars out of the drain tax assessed in the township of Newark for construction of Newark and Arcada ditch. [Act No. 169, Laws of 1871.

$547.20. D. W. ALTENBURG,
Drain Commissioner of Gratiot County.

Countersigned:
W. S. EVEREST,
Chairman of the Board of Supervisors.
W. B. SCATTERGOOD, *Deputy Clerk.*

(Endorsed:) Presented for payment this 25th day of October, *A. D.* 1873. S. W. Ambler, deputy treasurer of Gratiot county, Michigan. Paid March 31st, 1883, on the within order two hundred dollars, ($200.00.) S. B. Heverlo, county treasurer. Received March 31st, 1883, of said county treasurer the foregoing $200, as the agent of Eliza W. Brownell, of Niagra county, New York. W. E. Winton.

One of the orders counted upon was made to William Byrne, or bearer; and the orders are to be paid, as per contents, from drain tax assessed in townships of Newark, New Haven and Arcada. The declaration asserts the presentation of the orders, as per statute, and as shown by the first endorsements to the county treasurer. That said orders were made by a corporation and that they had been assigned, transferred and delivered to the plaintiff. The declaration concludes with the common counts in assumpsit, and appended thereto are copies of the several orders and notice that said orders will be given in evidence on the trial under the money counts. To this declaration the defendant pleaded the general issue and gave notice of some special defences, among them the statute of limitations. [Record pages 4–11.

The trial was had before a jury on the seventh day of November 1889; upon which day the evidence was introduced, arguments of counsel heard, and the case taken under advisement, by consent, until November 30th, 1889, when by order of court, a verdict was rendered against the defendant. "*That the said defendant did undertake and promise in manner and form as the said plaintiff hath in his declaration in this cause complained against it.*" The defendant was allowed ten days to move for a new trial, and plaintiff like time to move an amendment of the declaration. [Record page 12.] Both of these motions were made and heard by the court; Honorable Howell E. Jackson, circuit judge, and the Honorable Henry B. Brown, district judge, being present, on the fourteenth day of April, 1890. On said day plaintiff was allowed to amend his declaration by adding the following: "Whereby and by reason of the premises the said plaintiff is entitled to a judgement against said defendant

for the amount due and unpaid upon said orders; such judgment to be paid by causing the amount thereof, with interest and costs, to be assessed upon the lands benefited by the construction of said ditches." The motion for a new trial, having been considered, was denied July 22nd, 1890, opinion being filed by Judge Brown, being same upon which the verdict of the jury was ordered. [Record pages 14–22 and 28–33.] On July 23rd, 1890, judgment was entered upon the verdict, and on August 26th, 1890, this judgment was vacated and in place thereof judgment was entered in different form. In this last judgment the sum awarded plaintiff is five thousand one hundred and twenty dollars and fifty-six cents and costs, to be collected by assessment upon lands benefited by the drains in the several townships; said assessment to be enforced by mandamus against the board of supervisors of defendant county. [Record pages 22–24.]

Whereupon, defendant brings the cause to this court by writ of error issued October 13th, 1890. [Record pages 1–2.] The bill of exceptions contains all the evidence of plaintiff in said cause; and all the evidence of defendant deemed material for the consideration of the case in this court; also the charge of the Hon. Circuit Judge in full. [Record pages 25–33.]

"The orders upon which this action was brought were originally issued to one John Scriven for work done and materials furnished in the construction of two drains in the defendant county, and located in the townships of Newark, New Haven and Arcada, and no other. They were issued in pursuance of act No. 43, laws of 1869, as amended by act No. 169, laws of 1871. These drains were constructed by John Scriven under contract: First, with the drain commissioner of Gratiot county; Second, under contract with E. W. Kellogg, special commisioner, by act No. 445, laws of 1871, which provided that certain state lands in Gratiot county might be used in the payment for certain drains located in said county. *These lands were benefited by the construction of the drains* and were assessed for the same. Before the assessment was reported to the commissioner of the land office, Scriven made his selection of lands in payment of his contract with Kellogg. The commissioner of the land office would not issue patents to Scriven until these taxes were paid. In 1879 Scriven brought a suit in chancery in the Circuit Court for Gratiot county to set aside these taxes and compel the commissioner to issue patents, (pricipally on the technical ground of his selection of the land prior to notice of assessment) and had a decree in his favor as prayed. This decree, was not appealed from and patents were issued. *By this means the special fund from which these orders were to be paid was diminished by about $2000. Had those taxes been collected by the land commissioner and turned over to the county treasurer the orders would all have been paid.* In 1881, one Eliza W. Brownell, who

claimed to have received these orders from Scriven, petitioned the Supreme Court of Michigan for a mandamus against the board of supervisors, compelling them to pay these orders. Her petition was denied. 49 Mich. Reports 414." [Record pages 15-17.]

In the case of Brownell *v.* Gratiot Supervisors, no proof was made that petitioner was the legal holder of the orders in suit. And the court held that she was not entitled to the writ of mandamus unless her right to such orders was either admitted or proved. [Record page 32.] In the case at bar, no proof was offered by the plaintiff showing that he was the owner, or legal holder of these orders. Query. In a suit brought in the Circuit Court of the United States for the Eastern District of Michigan, for the sole purpose of obtaining a judgment upon which to base a writ of mandamus compelled by the difference in practice on writs of mandamus between the state court and the United States Court, ought not the rule laid down by the state court in the case of Brownell, above, be applied, and as a necessary prerequisite of judgment in such case, proof of the plaintiff's holding be required? Without discussing the question, I desire to say that the course pursued in both these cases impresses me strongly with the belief that neither Brownell nor Aylesworth were ever bona fide holders of these orders. In that case, we have John Scriven, having obtained his land in payment for his labor, confessedly benefited by the drains for the construction of which the orders are issued, coming into court on the one hand to relieve the land of its just burden, and on the other to compel his less thrifty neighbor to pay double taxation that he may have double pay.

The defendant contends that there should be a reversal of the judgment in the court below, for the following reasons:

1st. The court below erred in admitting the warrants in evidence; in holding that under the Michigan practice, the evidence offered supported the declaration, and in ordering judgment for the plaintiff.

2nd. The court erred in allowing an amendment of the declaration.

3rd. The court erred in its interpretation of the federal decisions and application of same to this case.

4th. The court erred in holding that the warrants sued upon were not barred by the statute of limitation.

5th. The court erred in holding that it had jurisdiction. There could be no suit unless upon the orders. The orders not being the obligations of a corporation, it must affirmatively appear that suit could have been maintained against the original payee. The circuit judge in his opinion, says: "As before observed, the proper remedy in the state court is by writ of mandamus; as the court is incompetent, in the first instance, to afford this relief, we think an action may be brought against

the county, and the collection of the judgment enforced by the same process of mandamus that would be resorted to if the proceedings had been instituted in the state court." Again: "We do not find it necessary to discuss at length the question as to when the statute of limitation begins to run upon these orders, because as to all but one of them it is admitted that a payment was made in 1883, which, upon any construction, would take them out of the statute. Upon the remaining order, it is quite evident that the statute is a complete defence. I shall therefore instruct the jury to render a verdict for the plaintiff in this case for the sum of $4847.12, and interest from November 7th—in all, $4868.74." [Record pages 31–33.

First.

It was incumbent upon the plaintiff in this cause—in accordance with Michigan practice—to support, by adequate proof, all the essential allegations of his declaration. On the trial he contented himself with the offer of the warrants, or orders, counted upon, and proof of the endorsement of March 31st, 1883. [Record pages 25–27.] An inspection of the declaration discloses that plaintiff's claim is based upon an alleged indebtedness created by the construction of certain drains in the territory of the defendant, which is alleged to be evidenced by the commissioners' warrants drawn upon the county treasurer. There being no evidence of the performance of any labor, or the furnishing of any material, or money, by the plaintiff, for the defendant, and on its request, it only remains to consider whether the orders, under the proof, sustained the allegations of the declaration and entitled plaintiff to judgment. To decide this question an inspection of the statute under which the orders were issued will be necessary. Such portions of Act No. 43 of the laws of 1869, as amended by Act No. 169 of the laws of 1871, as seem pertinent to the inquiry, are herewith given.

Section 9: "Any tax so assessed on state land shall be at once reported by said commissioner to the commissioner of the state land office, who shall enter on the books of his office, against each description of such state land, the amount of drain taxes assessed thereon, and no patent shall issue for such lands until said drain taxes are paid or otherwise provided for. * * *"

Section 15: "Whenever any tax levied for the construction of a drain under this act shall be reported back by the auditor general to the county treasurer where the same was levied, or shall be set aside by any court of competent jurisdiction, it shall be lawful for the *supervisor of the proper township* to re-assess such tax on the same land when such drain has been made. And it shall also be competent for the board of supervisors, upon the recommendation of the drainage commissioner, to re-assess upon the various lands, or portions of land, sections, or parts of sections of land by him deemed to be benefited or dam-

aged by any drain or drains, such amount or amounts of drainage taxes, to be assessed, levied, and collected as other state and county taxes are assessed, levied, and collected, as may be by them deemed necessary to correct any mistake or misapportionment of drain, or of taxes for the construction of the same by the drain commissioner. *Provided*, such appeal or review be brought before said county supervisors within one year from the time of such alleged mistake or misapportionment on the part of the said drain commissioner, or by appeal as hereinafter provided."

Section 17: "No money shall be paid by any county treasurer of any county in which a tax is assessed for the purpose of drainage, under this act, except on a warrant drawn by such commissioner, countersigned by the chairman and clerk of the board of supervisors of his county, and in the county of Wayne, the board of county auditors, and then only from the particular ditch fund provided for such ditch, and not otherwise."

Section 19: "Whenever any order drawn by the commissioner shall be presented to the county treasurer, and there shall be no funds in his hands applicable to the payment thereof, the county treasurer shall endorse thereon the date of such presentation, with his signature thereto. Such order shall draw interest from and after such presentation and endorsement."

Section 21 provides for an appeal from the commissioner to a jury of 6 within 10 days, and from the jury, within 10 days, to the board of supervisors as referred to in section 15.

Section 24: "The board of supervisors of each county in which a commissioner shall be appointed shall have full power and authority to control the action of such commissioner, and may order a re-assessment of the drain tax, or any portion thereof, to correct errors, as provided in section 15 of this act, and may make any other order in relation to such ditches or drains, or other matter relating thereto, not inconsistent with the public interests or the rights of individuals, which order shall be binding on such commissioner."

It nowhere appears in this act, even by implication, that the county is intended, in any way, to become a party to the construction of drains. They were to be surveyed, constructed and paid for by a commissioner appointed by the board of supervisors, and in certain respects under their control and supervision. The whole tenor of the statute is the allowance of certain local improvements using some of the county machinery, already in existence, in furtherance of the design, instead of creating new officers to collect and pay out the necessary taxes. In the state of Michigan the township, as well as the county, is a body corporate, and within its more limited territory, has most of the powers and privileges of the county. The legislature has seen fit to enact township drain laws, similar in most features to the county law. Regarding orders issued for constructions of

township drains, the Supreme Court says, "Ditch orders are not general township charges."

Catheart *v.* Merit Tp., 38 Mich. 243.

In another case the court says, Judge Cooley preparing the opinion: "The laying out of drains is commonly a matter of mere neighborhood interest; they affect small bodies of land, the taxes laid are local assessments, and do not and cannot under the statute, become a general charge. In the performance of his duties, the commissioner is in no sense the agent of the township, and there is no township responsibility for his defaults or misconduct. It is true these local levies are collected by the township treasurer and 'received into the township treasury,' but they are not received for the township, and do not at any time become a part of the township moneys. In the treasurer's hands they are a specified fund to be paid out upon order of the township board. But in drawing these orders the officers are not the agents of the town. The matter, as already stated, is not a town matter, but a mere neighborhood concern. For convenience, and to avoid a multiplicity of officers, certain township officers are charged with duties in connection with it; but this is a mere matter of administration; it does not change the nature of the proceeding, and it certainly does not clothe the officers in what they do with a township agency, for the very manifest reason that the township is not in any sense, as regards the duties performed by them, a principal."

Dawson *v.* Tp. Aurelius, 49 Mich. 479.

The reasoning of this case seems conclusive upon the question as to whether the county is the maker of the orders in suit. And the orders should not have been admitted in evidence in the case. Yet these orders were received against defendant's objection, which ruling it contends to have been error. The record shows that "the reception of these orders in evidence was duly objected to by defendant's counsel as incompetent and immaterial upon the following grounds: Under the allegations of the declaration a contract between defendant and some party must be shown. That they were in no sense the obligations of the defendant; that misappropriation of the funds must be shown; that the orders were not negotiable; that they come within the statute of limitations. On consideration the orders were admitted in evidence by the court, and defendant's counsel duly excepted." [Record page 27.] If these orders are not the obligations of the county, the theory of the declaration is not sustained, and judgment should have been awarded to defendant.

Second.

In avoidance of the difficulty pointed out, the distinguished counsel for plaintiff, after his proofs were in and the case closed on the testimony, asked permission, which after consideration was accorded him, to amend his declaration by adding the follow-

ing: "Whereby and by reason of the premises the said plaintiff is entitled to a judgment against said defendant for the amount due and unpaid upon said orders; such judgment to be paid by causing the amount thereof, with interests and costs to be assessed upon the lands benefited by the construction of the said ditches." I am unable to see the right plaintiff had to this amendment, or the benefit of it. It is clearly contradictory to the claim made in the body of the declaration, which would only entitle plaintiff to a judgment against the county, to be collected the usual way, unless some provision is made in the statute for a general judgment, to be collected from a neighborhood. No such provision is made.

Third.

Doubtless, the amendment of the declaration was asked and allowed, and judgment rendered in the court below, under the influence of certain decisions of the federal courts cited in the charge of the Hon. District Judge. The theory of the plaintiff under the amended declaration, and adopted by the Circuit Court, was, that this is in the nature of an application for a mandamus to the board of supervisors to compel them to spread a tax for the payment of the warrants, made necessary because a petition for a writ of mandamus in the federal court will not be entertained as an original proceeding. Considering the case in this view, it would seem to have been conclusively disposed of by the Supreme Court of Michigan in the case of Brownell *v.* Gratiot Supervisors, 49 Mich. 414. To be sure, the relator, or plaintiff in this case is a different person, but otherwise, the position is the same. While in that case the holding of the court was that the relator could not be held entitled to the writ because there was no proof that she was legal holder and owner of the orders; still there is enough in the case, the statute being considered, to justify the conclusion that the writ would have been denied in any event. It must be assumed, I think, that the relator was either not able to prove legal ownership, or adopted the above view of the case, as the application was not removed. The federal cases, relied upon in the Circuit Court, were actions brought upon bonds issued under statutes of Nebraska and Missouri differing ~~wildly~~ from the Michigan statute.

"Section 6. Any county or city which shall have issued its bonds in pursuance of this act shall be estopped from pleading want of consideration therefor, and the proper officers of each county or city may be compelled by mandamus or otherwise, to levy the tax herein provided to pay the same."

"Section 7. Any precint, in any organized county of this state, shall have the privilege of voting to aid works of internal improvement, and be entitled to all the privileges conferred upon counties and cities by the provisions of this act; and in such case the precinct election shall be governed in the same man-

ner as is provided in this act, so far as the same is applicable, and the county commissioners shall issue special bonds for such precinct, and the tax to pay the same shall be levied upon the property within the bounds of such precinct. Such precinct bonds shall be the same as other bonds, but shall contain a statement showing the special nature of such bonds."

General Statutes of Nebraska, 448.

The Nebraska Supreme Court, construing this statute, say that the bonds, whether for county or precinct purposes, are county bonds.

State *v.* Thorne, 9 Neb. 461;

State *v.* Dodge Co., 10 Neb. 20.

The Missouri cases are based upon a statute permitting the county to issue bonds in behalf of a township in a similar form to the Nebraska bonds, and said bonds were also held to be, in effect county bonds. In all these cases, while the bonds varied in form, they were all issued under the same statute, (in each state) and the argument in the decision of the Supreme Court was, that they were the obligations of the county, and therefore suit could be maintained.

Jordan *v.* Cass Co., 3 Dillon 185;

Cass Co. *v.* Johnston, 95 U. S. 360;

Davenport *v.* Co. of Dodge, 105 U. S. 237;

Blair *v.* Cumming Co., 111 U. S. 363.

The Arkansas cases are nearer the one at bar, in principle. Under the Arkansas statute, levy warrants were issued by the inspector, and it was made the duty of the county clerk, on presentation of these warrants, to issue a renewal bond, or draft. In payment of these it became the duty of the county court to levy an annual tax on the levee districts. The court say, "The machinery of the county was to be used in the levy and collection of the special taxes required, but the county, as a county, was to be in no way involved." Money judgement denied.

Boro *v.* Phillips Co., 4 Dillon 216;

Meath *v.* Phillips Co., 108 U. S. 553.

Since the Supreme Court passed upon these cases, and relying upon the principle sustained in the Nebraska and Missouri cases, suit was brought in the Circuit Court of the United States for the northern district of California to compel the assessment of a tax to pay for certain improvement bonds signed by the mayor of the city and county of San Francisco; action being against the city and county. The well considered opinion of Mr. Justice Field, in this case, leaves little to be said upon the question involved. He says, "The asserted ground of the action is, that it is essential to establish the validity of the bonds, as a preliminary to an application for a mandamus to levy the special tax. Counsel assume that the validity of the bonds issued by one party can be determined in an action against another in no way

named in them, nor liable for their payment. We do not so understand the law. We have not met with any adjudged case to that purport. On the contrary, we have always supposed the party actually liable on a bond, must have his day in court, in person, or by his representative, before a judgment determining its validity as against him or his estate, could be regarded as having any binding force. Such liability cannot be vicariously imputed to him, or charged upon his estate. If the action be to charge particular property, of which there is no representative, *there is a defect in the law which the legislature and not the courts must supply.*" While it is necessary to obtain a judgment against a corporation before mandamus can issue, whether it is a general or special tax the writ is to direct, and whether against all or a portion of the property within its limits, *still there must be a corporate liability preceding the judgment.* "It is the liability of the corporation established by the judgment which is to be discharged by the levy of the tax prayed, and not the liability of any other body."

Lieberman *v.* City and County of San Francisco, Vol. 11 Sawyer's Reports 9th Circuit 147.

An examination of the Michigan statute, in the light of these cases, and the opinion of Judge Cooley, herein cited, leads irresistably to the conclusion that the warrants in this suit are in no sense the obligations of defendant, it being the manifest intention of the legislature not to bind the county in any way, but simply to use machinery already existing, in levying and collecting the necessary tax.

Further, it cannot be claimed for a moment, that the statute can be extended in any way, nor powers not specifically granted, implied; nor can the board of supervisors be required to do anything not specifically directed by the statute. The only powers granted to the board of supervisors, over the question at issue, are given under sections 15 and 24 of the statute, and they must be construed together. It will be observed that when a tax has been set aside by a court of competent jurisdiction—this case—the supervisor of the proper township should re-assess the tax upon the same premises. The board only control the actions of the commissioner, and have the right of re-assessment, as a board, upon review or appeal within one year only. If the powers of the board are pressed further under section 24, they are still limited by that section to orders not inconsistent with the rights of individuals. What can be more inconsistent with such rights, than for the boards of supervisors to assess against all the lands in the various townships, benefited by the several drains, the amount of these warrants, with the accumulated interest of years, and the costs of the proceedings? Yet by the judgment in this case, the court seeks to compel the board to this very course, although it is conceded that all the lands, save those relieved under the action of the original holder of these

warrants, have once paid their full proportion of benefits. This is not justice, which could only be obtained, as to this point, by a reformation of the judgment, requiring the proper supervisors to re-assess the amount upon the lands benefited by the drains, but relieved by the action referred to, and in accordance with section 15 of the statute. But, says plaintiff, these lands might not sell for enough to pay the bill. Let me quote the words of this court. "Every purchaser of a municipal bond is chargeable with notice of the statnte under which the bond was issued. If the purchaser in this case had examined the statutes under which the county was acting, he would have seen what might prove to be difficulties in the way of payment. As it is he holds the obligations of a debtor who is unable to provide the means of payment."

U. S. *v.* County Court of Macon Co., 99 U. S. 582.

This being the correct rule relative to municipal bonds and county obligations, it should certainly be applied to the warrants in this suit.

Fourth.

The statute of limitations is a defense to these orders. On the trial of the case, order No. 371 was found nearly paid by an endorsement, overlooked, made in 1880, and was not offered in evidence. Order No. 372 showed no endorsement after 1875, and was rejected by the court on the ground that the statute was a complete defence. [Record pages 9, 25, 26, 27, 33.]

The Michigan statute, as far as applicable, is as follows: "The following actions shall be commenced within six years next after the cause of action shall accrue, and not afterwards, that is to say: 4. All actions of assumpsit, or upon the case, founded upon any contract or liability, express or implied."

Howell's Annotated Statutes, section 8713.

Section 8729 provides that nothing in the preceding sections shall alter the effect of payment, but endorsements made by payee shall not be sufficient proof of payment. Under section 8713, subdivision 4, assumpsit must be brought in six years, whatever the cause of action, it being the form and not the cause which fixes the bar.

Sigler *v.* Platt, 16 Mich. 206;

Goodrich *v.* Leland, 18 Mich. 110.

Certainly, in the case at bar, the cause of action accrued, if ever, more than six years before the commencement of this action, unless the payment made March 31st, 1883, relieved the matter from the effect of the statute. I am unable to agree with the distinguished judge at circuit, that the payment, so made, had such effect. It is an elementary doctrine upon this subject that payment must be made by the principal, or some one authorized by him, in order to take a cause of action out of the statute; and also that the statute is one of repose. In this case the

county treasurer had no authority to make the payments as he did. His duties are fixed by the statute, and are to receive the money collected and keep it in the proper fund, to pay it out on orders drawn by the commissioner and properly countersigned, when there are no funds, to endorse upon the order the date of presentation. There can be but one intent to this statute on the point of payment, that is to require the treasurer to pay the orders, if he has the funds, such orders and only such, being vouchers in his hands against the respective funds. In this the statute is in line with that which fixes the general duty of the county treasurer upon the payment of money. On March 31st, 1883, the county treasurer should have paid the orders as far as the funds in his hands would permit, and then his duty ended and his powers were exhausted. I contend that, under the doctrine above stated, the unauthorized act of the custodian of the funds, against which these orders are drawn, cannot take them out of the statute. They are barred.

Fifth.

The Circuit Court had no jurisdiction of the case. In his declaration the plaintiff alleges his own citizenship and that of defendant; the one in New York, the other in Michigan. He fails to allege the citizenship of the first payee. If our contention is correct, that the warrants sued upon are not the obligations of the county, then they are not made by a corporation, and it must be made to appear that the suit is one that could have been prosecuted in the federal court, had no transfer been made. The citizenship of the first payee not affirmatively appearing, it must be considered that the original parties were citizens of the same state—true—and the court without jurisdiction.

U. S. Nat. Bk. *v.* McNair, 56 Fed. Rep. 324;
Parks *v.* Ormsby, 141 U. S. 81, and cases there cited.

Respectfully submitted,

C. J. WILLETT,
Attorney for Plaintiff in Error.

BRIEF FOR DEFENDANT IN ERROR.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1894.

No. 292.

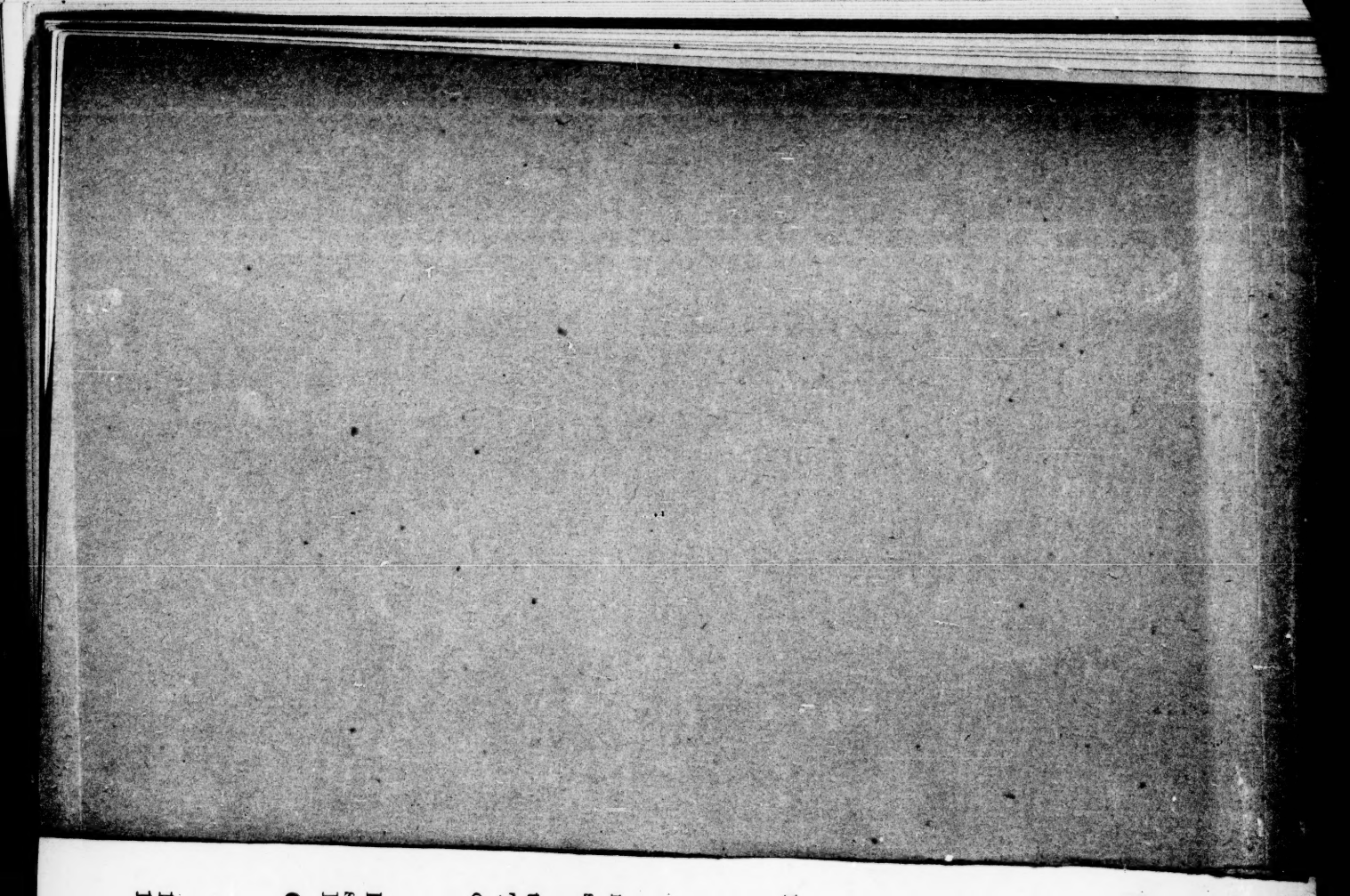
THE COUNTY OF GRATIOT, PLAINTIFF IN ERROR,

vs.

HENRY M. AYLESWORTH.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF MICHIGAN.

(14,842.)



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BRIEF FOR DEFENDANT IN ERROR (Plaintiff Below).

Inasmuch as, at the time of printing this brief, no brief had been received from the counsel for plaintiff in error, we preface it with a statement of facts.

The plaintiff below (defendant in error here) brought his action in the United States Circuit Court upon certain county warrants or orders. These warrants were all of similar form, and one will do as a sample of all.

No. 257. ITHACA, MICH., Nov. 7, 1872.

County Treasurer, Gratiot County.

Pay to John Scriven, or bearer, three hundred and seventy-six dollars out of the drain tax assessed in the township of Arcada for construction of Newark & Arcada ditch, in said township. Act No. 169, Laws of 1871.

D. W. ATTENBURG,
Drain Commissioner of Gratiot County.

Countersigned:

H. T. BARNABY,
Chairman of the Board of Supervisors.

N. CHURCH,
Clerk.

(Indorsed:) Presented for payment this 16th day of November, 1872. W. S. Turck, Treasurer of Gratiot Co., Mich. Paid March 31, 1883, on the within order, $148.46. S. B. Haverlo, County Treasurer.

Received March 31, 1883, of said County Treasurer, the above $148.46 as the agent of Eliza W. Brownell, of Niagara Co., N. Y. W. E. Winton.

Action was brought a few days before the six years had elapsed from the time of said part payment.

The declaration counts specially upon these warrants or orders, and concludes with the common counts with notice that under the money counts plaintiffs would give in evidence these warrants, giving copies of them.

Rec., pp. 4–7.

Defendant pleaded the general issue, and gave notice (1) of the statute of limitations; (2) that these orders were payable out of a special fund which could not be collected by reason of the misconduct of the plaintiff's assignor; (3) *res adjudicata*, setting up a mandamus proceeding in the State courts.

Rec., p. 11.

The first special defense seems to be practically abandoned, as the action was brought clearly within six years after a partial payment on the warrants, and under the Michigan statutes the action was clearly not outlawed.

As to the third special defense, the charge of the court below was favorable to the plaintiff, but no exception was taken to it, save a general exception to the whole of the charge, and no error is specially assigned on this point.

Rec., pp. 35–6.

The case went to trial, and plaintiff introduced in evidence the warrants or orders and proved the indorsements. Defendant objected to the introduction of the warrants on the grounds that these orders were in no sense the obligations of the county so as to enable any sort of an action to be maintained against it on them; further, that there must be shown a misappropriation of the special fund; that the orders were not negotiable, and that they came within the statute of limitations. The orders were admitted, and defendant excepted.

Defendant introduced bill, answer and decree in case of *Scriven vs. Neasmith*, but this, although admitted in evidence, does not appear in the record.

Defendant showed further that these orders were the same as those

involved in a mandamus case in the State courts, but this mandamus case does not appear in the record.

There were no requests to charge shown by the record.

The court charged the jury very fully, and directed a verdict for plaintiff on certain of the orders. The charge is set forth at length in the bill of exceptions, although no exception was taken to it save a general exception "to the opinion and charge."

Rec., p. 33.

This court has severely criticised the incorporation of the whole charges in the record. (*Phœnix, etc., Co. vs. Roddin*, 120 U. S., 183.)

Verdict was rendered and judgment had against the county in special form, directing that a writ of mandamus should issue to compel the levy of a tax to pay this amount pursuant to the statute authorizing the issue of these warrants.

Rec., p. 23.

A motion for a new trial was argued before Judges Jackson and Brown, and denied.

Rec., p. 15.

The defendant now comes here.

The assignments of error purport to raise these special questions.

Rec., pp. 35–6.

1. Are these warrants obligations of defendant county in such a sense that an action praying for a special judgment of mandamus can be maintained against the county on them?

2. Had the court jurisdiction under the act of 1887?

3. Was the statute of limitations a defense?

4. Was it necessary for plaintiff to show a misappropriation of the special funds before he could recover against the county?

5. Did the declaration set forth a cause of action?

6. Did the court err in allowing plaintiff to amend declaration at the trial, so as to pray for a special instead of a general money judgment?

An abstract of the law under which these warrants were issued is contained in the charge of the learned judge before whom the case was tried below.

Record, pp. 29–30.

And to this reference is made.

The sections of the statute bearing on the present controversy are printed in full at the end of this brief.

I

There is a general assignment of error based upon the general exception to the judge's "opinion and charge," that the circuit judge erred in instructing the jury to render a verdict for the plaintiff, when he should have charged them to find for the defendant.

Rec., p. 35.

We understand it to be the settled rule of this court that where any part of a charge is correct, advantage cannot be taken of an erroneous part under a general exception of this sort.

Lincoln *vs.* Claflin, 7 Wall., 132.
Holden *vs.* U. S., 150 U. S., 91.

It may be said that this rule ought not to apply to a case in which the judge, as a part of his charge, directs the jury to find a verdict for plaintiff, but we take it that such a contention arises from a misapprehension of the real reason for the rule. This is that the court below should be specially apprised, before the jury leaves the bar, of the particular respects in which his charge is deemed erroneous, so as to give him then and there an opportunity to correct the same, and the court is entitled to this opportunity whether his error be in the form of his leaving certain questions to the jury or in his not leaving anything to them.

This doctrine is approved by this court in a case in which there were two distinct issues, on one of which the trial judge directed a verdict.

Block *vs.* Darling, 140 U. S., 234.

Plaintiff sued defendant on a certain claim which defendants denied; defendants also asserted a counter-claim for unliquidated damages on a separate transaction on which they asked judgment against the plaintiff. At the trial the court charged fully, and said in conclusion:

"It is the duty of this court to tell you that the defendants have not made out any case for damages. You will therefore retire to consider the verdict and return what you find to be the balance due plaintiff."

Defendants "excepted to all and each part of the foregoing charge and instructions."

This court said on this point,

"The question is not properly before us as to whether the court erred in its charge to the jury in the counter-claim. The general exception 'to all and each part of the foregoing charge and instructions' suggests nothing for our consideration. It was no more than a general exception to the whole charge. The court below was entitled to a distinct specification of the matter, whether of fact or law, to which objection was made. The charge covered all the facts arising out of the counter-claim, and clearly stated the law which in the opinion of the court governed the case. If its attention had been specifically called at any time to any particular part of the charge which was deemed erroneous, the necessary correction could have been made. An exception 'to all and each part' of the charge gave no information whatever as to what was in the mind of the excepting party, and therefore gives no opportunity to the trial court to correct any error committed by it."

Citing,

Harvey *vs.* Tyler, 2 Wall., 328, 339.
Beckwith *vs.* Bean, 98 U. S., 266, 284.
Mouler *vs.* Am., etc., Co., 111 U. S., 335.

The case of

Dunlap *vs.* R. R., 130 U. S., 649,

is distinguishable, as in that case, so far as the record shows, the court simply directed a verdict for defendant, and plaintiff excepted to this instruction. This case should not be regarded as controlling where, as in the case at bar, or the *Block vs. Darling* case, the charge covered the facts, "and clearly stated the law which in the opinion of the court governed the case," although the court finally stated that the jury should find a particular way upon the issue (—in *Block vs. Darling*, on one of the distinct issues).

II.

To take up then the various special errors assigned.

Are these warrants in such a sense obligations of the County of Gratiot that upon them plaintiff may maintain an action praying for a special judgment to compel the levying of a tax for their payment?

The question appears to have been first discussed in the case of

Jordan *vs.* Cass Co., 3 Dillon, 185,

in which the court say that at common law, judgments may be so moulded as to conform to the rights of parties under the law, and that where bonds are issued in the name of the county on behalf of an unincorporated district, an action for a special judgment may be maintained against the county.

This decision was approved in

County of Cass *vs.* Johnson, 95 U. S., 360.

This was an action upon certain bonds issued by the county court of Cass county, Missouri, reciting that they were issued to a railroad for and on account of Camp Branch township, in pursuance of an order made by the county court, under an authority of an act of the Legislature.

Opinion of Chief Justice Waite:

"It is finally objected that, as the bonds are in fact the bonds of the township, no action can be maintained on them against the county. Without undertaking to decide what would be the appropriate form of proceeding to enforce the obligation in the State courts, it is sufficient to say that in the courts of the United States we are entirely satisfied with the conclusions reached by the court below, and that a judgment may be rendered against the county, to be enforced, if necessary, by mandamus against the county court or the judges thereof, to compel the levy and collection of a tax in accordance with the provisions of the law under which the bonds were issued. The reasoning of the learned judge in Jordan *vs.* Cass Co., 3 Dill., 185, is, to our minds, perfectly conclusive on this subject, and we content ourselves with a simple reference to that case as authority on this point. The judgment of the Circuit Court is affirmed."

To the same effect see also the case of

Davenport *vs.* County of Dodge, 105 U. S., 237.

This was an action upon special bonds which the county commissioners of Dodge county, Nebraska, issued for the precincts of the county in aid of works of improvement. The precincts were unincorporated. The general form of the bond was that of a certificate "that Fremont precinct, in the county of Dodge and State of Nebraska, is indebted to bearer, etc." The petition in the action set forth the issue of the bonds according to the facts, and prayed judgment, "said judgment to be collected by a tax upon the taxable property within the territory comprising said Fremont precinct." The statute provided for com-

pelling the proper officers of the county, by mandamus or otherwise, to levy a tax upon the property of the precinct.

"A bond implies an obligor bound to do what it is agreed shall be done. Precincts in Nebraska are but political subdivisions of a county. They have no corporate existence, and cannot contract or be contracted with. They have no corporate officers, and can neither sue or be sued. Certain officers are elected by the voters of precincts for political, administrative and judicial purposes, but they are in no sense the representatives of the people of the Territory as a municipality. State *vs.* Dodge Co., 10 Neb., 20. Precincts are governed by the county commissioners, the governing board of the county, and by the appropriate officers of the State. Their relation to a county is like that of a ward to a city. Having no corporate existence, no separate municipal authority, they cannot, says again the Supreme Court of the State in the case last cited, 'enter into contracts directly or indirectly, nor assume obligations which a court might be called on to enforce.' Hence, the precinct cannot become the obligor of precinct bonds, and we think it follows that the county, which does have a corporate existence, and can contract and be contracted with, and upon whose officers is imposed the duty not only of issuing the bonds, but providing for the payment of them, is the political entity bound by the obligation that is entered into and charged with the debt created thereby. The only difference between the two kinds of debt is, that in one all the taxable property in the county is charged with its payment, and in the other only a part. In both, the mandamus to enforce the levy and collection of the necessary taxes lies to the proper officers of the county alone. This remedy is expressly provided for, and thus the presumption that might otherwise arise of the intention to erect the precinct into a corporation for the purpose of these obligations, because, without it, the bonds could not be enforced, is rebutted. We think, therefore, that the special bonds which the county commissioners are to issue for the precincts are, in legal effect, the special bonds of the county, payable out of a special fund to be raised in a special way."

The court further say that in the courts of the United States, the writ of mandamus is only granted in aid of existing jurisdiction, and that in these courts a judgment at law is necessary to support the writ, which is in the nature of an execution to carry the judgment into effect, and, consequently, an action at law praying for a special judgment is the proper procedure in the Federal courts, although in State courts a mandamus might be asked for directly.

The cases of

Blair *vs.* Cuming Co., 111 U. S., and
Chickaming *vs.* Carpenter, 106 U. S., 663,

approve the Davenport case. The latter is a case from Michigan.

The case of

County of Nemaha *vs.* Frank, 120 U. S., 41,

was an action on certain Nebraska Precinct bonds. This court says:

"It seems also to be objected to the judgment rendered against the county of Nemaha that the coupons sued on are not the obligations of the county. It is said that the bonds are precinct bonds, issued by the county commissioners of the county, the duty to pay which rests upon the precinct alone; the mode of payment being by means of a tax to be levied by the county commissioners upon the property within the bounds of the precinct. It is therefore argued that no action will lie against the county in respect to these bonds and coupons, except in case of the refusal of the county commissioners to levy the tax when it ought to be levied, when a mandamus is the sole remedy, being the one prescribed by the statute. This question has been set at rest by the previous decisions of this court. Davenport *vs.* Dodge Co., 105 U. S., 237, and Blair *vs.* Cuming Co., 111 U. S., 363, are decisions upon the very point arising under the same statute."

The language of the Supreme Court of Wisconsin is instructive.

In Terry *vs.* Milwaukee, 15 Wis. 490, they say that where the city charter gave the president and secretary of the school board authority to draw orders on the city treasury, payable out of the school fund, and made it the duty of the treasurer to pay such orders out of the school money in his hands, it was held that such orders were evidences of indebtedness, upon which, if payment was refused for want of funds, an action would at once lie against the city. "It was also contended," said Cole, J., "that the orders drawn by the officers of the school board did not constitute any debt or create any liability against the city upon which an action at law could be maintained, because, it is said, that the city is but a mere trustee of the school fund for the purpose of disbursement and safe keeping, and when it applies that fund in payment of the orders drawn by the officers of the school board, its duty and liability in the premises cease. The holder of these orders, it is claimed, stands in precisely the same relation to the city that the holder of a check upon a bank, drawn by a party having no funds in the bank, does in respect to the bank upon which it is drawn. It appears to us that this is an erroneous view of the subject. The orders, drawn by the officers of the school board, are as much evidence of the indebtedness against the city as an order drawn by the mayor and clerk would be. It is quite true that the law provides that the school fund shall be exclusively applied to the payment of teachers' salaries and other necessary expenses of the public schools; but suppose the fund is inadequate and insufficient to meet these expenses and discharge the orders of the school board, is there no remedy against the city? We have no doubt about the liability of the city on these school orders. It is the duty of the city authorities to raise money to pay them, as much as to discharge any other just indebtedness against them. If the city authorities neglect to exercise this power, or fail to levy and collect a revenue sufficient to meet its indebtedness, this is no reason why it should be relieved from all liability to those who have just claims against it for teaching its public schools. It seems to us that there can be no doubt about the correctness of these principles of law."

In the case of

Meath *vs.* County of Phillips, 108 U. S.,

the action was on drafts drawn by levee inspectors on the levee treasurer of the county. The decision is simply that such warrants are not obligations of the county of such a character as to justify a general money judgment against it, but are obligations only of the levee district; and on the question as to whether a special judgment would be proper compelling the county court to levy a tax on the levee district to pay these demands, the court decided that the claims were clearly outlawed.

On motion for a rehearing below, reliance was placed on the case of

Liebman v. City and County of San Francisco, 24 Fed. Rep., 705.

But this case, when examined, will be found to have no bearing on the case at bar.

It was an action brought against the city and county upon coupons to certain bonds issued under an act of the Legislature relative to the opening of a certain street. The act created and appointed a special board with a special seal, and this board was authorized to issue these bonds under the hands of its members. The act expressly negatived any liability on the part of the city, and the legislative authority of the municipality, the board of supervisors, had no control over the work.

"In these matters the board (i. e. the special board created by the act) acts independently of the municipality. It is made the agent of the State to carry out a public improvement directed by its statute, and not the agent of the city or county."

The court says that the act imposes no duty upon the corporation relating to the opening of the avenue; that it is not authorized to do the acts necessary to the opening, nor required to see that the cost of the work upon completion, should be collected and paid.

"Clearly, it seems to me, the State has undertaken to do this work, through instrumentalities chosen by itself, of which instrumentalities the corporation called the city and county of San Francisco is not one."

The whole argument is summed up as follows:

"Thus the statute in no provision authorizes the city and county of San Francisco, in its corporate capacity, or by the board of supervisors, its legislative and controlling body, or otherwise, to do anything in the matter of opening and dedicating to public use Montgomery avenue or to meddle with the funds provided for that purpose, or to assume any obligation or responsibility in the matter.

The act imposes no duty or obligation upon the corporation or upon its controlling body, nor does it even confer any power to act in any

manner in regard to the work of opening Montgomery avenue, while, on the contrary, it expressly provides that it shall not, in any event whatever, be liable for the payment of the bonds, nor any part thereof, provided to be issued under this Act."

How different is the present case.

Here the State does not appoint the drain commissioner; he is appointed by the board of supervisors. The fact that the board in the case referred to was not appointed by the common council or board of supervisors, is considered largely controlling.

In that case the board was an independent corporation, in no way or manner under the control of the common council or board of supervisors.

Here the commissioner is to execute his duties as such under the act, "and the resolutions and orders of the board of supervisors of his county, lawfully made relating to his action therein." And the board is given full power and authority to control his action. (Sec. 24.)

There the board was not required to make a report of their doings to the city or county authorities.

Here the commissioner is to make a full report of all his doings in the premises to the board of supervisors.

There the bonds were not to be signed by the mayor as such, or by the city or county officers.

Here they are not valid until countersigned by the chairman and clerk of the board of supervisors.

In that case, "There being no liability of any kind, and no duty to perform by the municipality in its corporate capacity, in relation to said instruments, no action or judgment can be rendered in the case that could avail anything as a foundation for proceeding by mandamus to compel the assessment and collection of a fund for the payment of the coupons and ultimate redemption of the obligations in question. * * * * The judgment, under such circumstances, could not afford any valid or legal foundation for proceeding by mandamus against the parties charged with the duty of assessing and collecting the Montgomery avenue bond tax."

Here the board of supervisors "shall have full power and authority to control the action of such commissioner, and may order a re-assessment of the drain tax, or any portion thereof, to correct errors, as provided in section fifteen of this Act" (Sec. 24).

"SEC. 15. Whenever any tax levied for the construction of a drain under this act shall be reported back by the auditor-general to the county treasurer where the same was levied, or shall be set aside by any

court of competent jurisdiction, it shall be lawful for the supervisor of the proper township to re-assess the tax on the same land where such drain has been made. And it shall also be competent for the board of supervisors, upon the recommendation of the drainage commissioner, *or upon a review before them, had by appeal from the action or decision of the drain commissioner*, to re-assess upon the various lands, or portions of land, sections, or parts of sections of and by him deemed to be benefited or damaged by any drain or drains, such amount or amounts of drainage taxes, to be assessed, levied, and collected as other State and county taxes are assessed, levied and collected, as may be by them deemed necessary to correct any mistake or misapportionment of drain, *or of taxes for the construction of the same by the drainage commissioner*," etc.

So that, unlike the California case, ample power is given to the board of supervisors, the legislative organ of the county, to assess taxes to pay these orders. In fact, the whole work is done by the county through its own officers, and a judgment against the county will afford an ample basis for a writ of mandamus to compel the providing of a fund to take care of the orders in suit, for the writ will run to the legislative officers of the county—the board of supervisors—who have by statute full power to raise money for these orders by levying an assessment, and not, as would have been the case in the California case, to agents of the State in no way under the management or control of the defendant municipality.

The Supreme Court of Michigan has said:

"The county drain commissioner was under the control of the board of supervisors, the legislature of the county, and this board, under the laws, had full power and authority to control his action and to order a re-assessment of the drain tax or any portion of it, to correct errors, and to make any other order in relation to the drain, not inconsistent with public interests or the rights of individuals."

Mason *vs.* New Haven Township, 82 Mich., 435, 438–9.

Consequently, in view of the well settled doctrine of this court on the question of the liability of a county for obligations of an unincorporated precinct or district, the action, praying for a special judgment to compel the county to provide funds, will lie.

See opinion of Judge Brown, Rec., pp. 28–31.

III.

The second question raised by the assignments of error is whether the Circuit Court had jurisdiction under the act of 1887.

This is a chose in action payable to bearer and made by a corporation, and so comes within the language of the act. It has been many times expressly decided that the circuit courts of the United States have jurisdiction under this act of an action by a transferee of a county warrant payable to bearer.

Newgass *vs.* New Orleans, 33 Fed. Rep., 196.
Rollins *vs.* Chaffee, 34 Fed. Rep., 91.
Jerome *vs.* Commissioners, 18 Fed. Rep., 873.
Bank *vs.* Barling, 46 Fed. Rep., 357.

The general and approved doctrine is, that county warrants are negotiable instruments, although not subject to all the rules of commercial paper, *e. g.*, freedom from equitable defenses in hands of *bona fide* holder.

District of Columbia *vs.* Cornell, 130 U. S., 655.
15 Amer. & Eng. Enc. of Law, pp. 1208, 1224.
Mayor *vs.* Ray, 19 Wall., 468.
Charge of Judge Brown, Rec., p. 31.
Wall *vs.* Monroe County, 103 U. S., 74.

An obligation payable to bearer creates a direct obligation from the maker to bearer, and not merely an obligation by assignment.

Clendening *vs.* Carpenter, 106 U. S., 663.
Jerome *vs.* Rio Grande Co., 18 Fed. Rep., 873.
Thompson *vs.* Perrine, 106 U. S., 589.

IV.

It is difficult to see how the statute of limitations can be applied here. On all the orders on which a recovery was permitted, there was a partial payment on March 31, 1883, evidenced by the signature of the county treasurer, the officer whose duty it was to pay the warrants.

The summons was issued March 29, 1889.

Rec., p. 3.
Judge Brown's opinion, Rec., p. 33.

We would be prepared to contend, if necessary, that the statute of limitations does not run on orders of this kind, but in view of the above, find it unnecessary.

V.

Was it necessary for plaintiff to show a misappropriation of the special fund before he could recover against the county?

Clearly not. We could not show a misappropriation of the fund, because a fund of sufficient size to pay these orders never came into existence to be misappropriated. Our grievance is not that the county misappropriated the fund, in which case we might have a right to a general judgment against the county by reason of the misappropriation, but it is that the county has taken no steps to create a sufficient fund, and by reason of the rule as to writs of mandamus in the federal courts, we are compelled to get a special judgment as a basis for a writ to require the proper county authorities to take suitable steps so to create a fund.

It would be a strange anomaly, indeed, if it were a defense to an action to compel a county to levy a tax to pay warrants, that plaintiff should show that the county has misappropriated the fund which had not yet been raised. The mere statement of the matter shows its absurdity.

In case of municipal neglect to raise a proper fund to pay orders, the remedy is that which will place the fund in proper condition.

Peterson *vs.* Manistee, 36 Mich., 8.

Furthermore, the question is not properly here, because the assignment of error that "circuit judge erred in holding that it was not necessary to show a misappropriation of funds before recovery could be had against the county defendant," in the first place purports to assign error upon a theory and not upon language, contrary to the correct rule laid down in

Bogk *vs.* Gassert, 149 U. S., 17, 25–6,

and, in the second place, is based on nothing since the circuit judge never held this, save by overruling an objection of defendant to the introduction of the orders in evidence, and clearly a matter of this sort, depending on facts occurring subsequently to the issue of the orders,

and not appearing on their face nor affecting their issue, was no valid objection to their reception in evidence.

VI.

Did the declaration set forth a cause of action?

We take it as a general rule of practice that an assignment of error must be based upon some exception takon at the trial.

The seventh assignment is, "Said judge erred in holding that a sufficient cause of action was set forth in the declaration."

This court will pass upon only those exceptions that are properly framed and presented by the record.

Hanna *vs.* Maas, 122 U. S., 24.

The bill of exceptions,

Rec., p. 27,

does not show that the trial judge ever held thus, for the very simple reason that no question was made as to it on the trial, either by way of an objection to the introduction of any evidence under the declaration, or by any motion suitable to raise this question.

Indeed, it is hard to see how the common counts, which were included in the declaration, can be considered as not setting forth a cause of action, especially as municipal warrants are such evidences of debt as are admissible under the common counts.

Clark Co. *vs.* Lawrence, 63 Ill., 32.

The question of the sufficiency of the declaration cannot be considered to be before this court. It is sufficient answer to a position to say that it does not appear from the record to have been urged in the court below.

Houghton *vs.* Jones, 1 Wall., 702.

VII.

The last assignment of error relates to the action of the trial court in permitting an amendment to the declaration by which the prayer was changed from one for a general money judgment to a special judgment awarding a writ of mandamus. There does not appear to be any excep-

tion on which to base this assignment. The Michigan statute provide that the court in which any action is pending shall have power to amend any process, pleading, or proceeding in such action, either in form or substance, for the furtherance of justice, on such terms as shall be just, at any time before judgment rendered therein.

2 Howell's Statutes, Sec. 7631.

U. S. Revised Statutes, Sec. 954, appears equally broad.

It will be noticed also that this amendment in no way changed the issue which defendant was called upon to meet; it simply limited the extent of plaintiff's judgment.

Allowance of amendments to pleadings is not reviewable.

Bullett Co. *vs.* Washer, 129 U. S., 677.

Chapman *vs.* Barney, 130 U. S., 146.

VIII.

We submit, then, that as to each of the legal questions properly raised by this record, the contention of defendant must be regarded as without merit. There were other matters argued at the trial, but we cannot see that they are properly before this court.

Of such a kind is the contention that plaintiff was bound at the trial to prove that the proceedings for the assessment and collection of the tax were regular.

This question was not saved by a specific exception at the trial, nor is it referred to in the assignments of error unless the omnibus one that the "circuit judge erred in instructing the jury to render a verdict for the plaintiff when he should have charged them to find for the defendant."

Rec., p. 35,

can be taken as specific enough to cover it.

But in any event the point is without merit.

The execution of the instruments was admitted by the plea and the indorsements were proved.

The nature of similar warrants has been frequently before this court, and the decision has uniformly been that they establish *prima facie* the correctness of the claim.

The case of

Wall *vs.* Monroe County, 103 U. S., 74,

was an action on general county warrants drawn by the clerk upon the treasurer.

This court said:

"The warrants in suit are evidences of indebtedness by the county of Monroe, issued by that branch of its government to which it is intrusted, by the laws of the State, the examination and approval of claims against the county. They are orders upon the treasurer of the county to pay out of its funds for county purposes, not otherwise appropriated, the amounts specified. They establish *prima facie* the validity of the claims allowed, and authorize their payment."

So in the case of

Mayor, etc., *vs.* Ray, 19 Wall., 468,

this court said, that in absence of proof to the contrary, it may be presumed that city warrants were properly issued at their inception.

See also

Dorian *vs.* Shreveport, 28 Fed. Rep., 287.

The act under which these warrants are issued provides for their presentation to the county treasurer and indorsement by him, after which they shall draw interest, evidently meaning to make them liquidated and approved demands. The act also provides (Sec. 22) for the receipt of these warrants for taxes. The Supreme Court of Michigan has held in the case of city orders, that they "are all liquidated claims, and could not be made any more so by judgment."

Peterson *vs.* Manistee, 36 Mich., 8.

Repeated instances of this same doctrine are found in the Michigan courts. These warrants are generally enforced by mandamus directly, and relator always relies on the warrants as establishing a *prima facie* claim. By the act under which these warrants are issued, they are treated as sufficiently liquidated claims to be receivable for taxes (Sec. 22).

IX.

So, also, as to the question of the effect of the case of Brownell *vs.* Gratiot Supervisors.

The record in this mandamus proceeding is not included in the rec-

ord of the case at bar, nor does any exception or assignment of error appear in regard to it.

The reference by the bill of exceptions to the record in another case is not sufficient to bring it before this court. It must be incorporated in the bill.

South Carolina vs. Wesley, decided by this court January 7, 1895.

To obtain a reversal of a judgment, the facts relied upon must appear affirmatively in the record.

New York, etc., Co. *vs.* Fraser, 130 U. S., 611.
Red River Co. *vs.* Sully, 144 U. S., 209.

The judge's charge is not a finding of facts, and the facts which make a charge erroneous must affirmatively appear, it not being sufficient to show that the judge assumed them in his charge to the jury.

Louisiana, etc., Co. *vs.* Tweed, 7 Wall., 44.
Worthington *vs.* Mason, 101 U. S., 149.
Jones *vs.* Buckell, 104 U. S., 554.

So that this matter is not properly before this court.

Furthermore, mandamus is in Michigan a discretionary writ, and "does not purport to adjudge or decide any right. It is rather in the nature of an award of execution than of judgment. It is a mode of compelling the performance of acknowledged duty or enforcing an existing right, rather than deciding what that right or duty is. The award is no finality. It concludes nothing."

Burland *vs.* Mutual Benefit Assn., 47 Mich., 425.

Mandamus is not a writ of right, and is not usually allowed to those who have been culpably dilatory or otherwise at fault.

Mabley *vs.* Superior Court Judge, 41 Mich., 31.

The court may in its discretion refuse the writ altogether, unless the party seeking it consents to do equity.

Auditor-General *vs.* Saginaw Supervisors, 62 Mich., 579.

The relator is not entitled to the writ unless the facts establishing such right are either admitted by respondent or proved.

Brownell *vs.* Gratiot Supervisors, 49 Mich., 414.

So it is apparent that the failure of a previous holder of these warrants to procure a writ of mandamus to enforce their collection, in no way is *res adjudicata* as to their validity.

X.

It would hardly seem necessary to refer to the contention that the case of *Scriven vs. Neasmith*, referred to in the bill of exceptions, constitutes a defense. The record in that case is not incorporated in this record, and there is nothing here save a reference to it in the judge's charge that gives any intimation of what it was all about, and as we have said above, the judge's charge is not a finding of facts. No exception was taken regarding it, nor any error assigned on the part of the judge's charge referring to it. In this state of the record it would seem an imposition on the patience of this court to discuss it.

We have discussed this record as satisfactorily as we can in view of its extremely imperfect condition.

Neither the matters properly before this court, nor the other possible defenses hinted at, seem to us to justify a reversal. We respectfully submit that the judgment of the court below should be affirmed.

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THOMAS SPENCER JEROME,

Of Counsel.

COUNTY DRAIN LAW.

An Act to provide for the draining of swamps, marshes and other low lands, approved and took effect March 22, 1869, Laws of 1869, page 70, as amended by Act 169, Laws of 1871, page 257, approved April 15, 1871. Being chapter 47 Compiled Laws of Michigan of 1871.

SECTION 1. "The people of the State of Michigan enact, That the boards of supervisors of each of the organized counties of this State shall have power, and are hereby authorized, at any regular or special meeting, by a vote of a majority of all the members elected, to appoint one county drain commissioner for such county, and who may hold his office for two years, and may, in like manner, remove such commissioner."

SEC. 2. Provides for oath and bond of drain commissioner.

SEC. 3. "Each drain commissioner so duly appointed, sworn and qualified by giving and filing such bond, and after filing with such clerk his postoffice address, shall have power and authority within his county to execute the duties of drain commissioner under this act, and the resolutions and orders of the board of supervisors of his county, lawfully made, relating to his action therein, and may at once enter upon the duties of his office. He shall record in a book, or books, to be furnished by his county, a full record of his official acts in detail, sign the same, and transfer such record or records to his successor in office, or file the same in the office of the clerk of said board. He shall also file and keep in his office certified copies of all accounts against each drain or watercourse laid or established, or cleaned out, under this act. He shall open an account with each drain or watercourse, by name or number, and draw all proper orders on each drain fund, charging them over to its proper fund, from which they shall be paid, and not otherwise. He shall report to such board from time to time, in detail, his action in relation to such drain or watercourse, and file the same with such clerk for the examination of such board; and all orders drawn by him shall not be valid until countersigned by the chairman and clerk of such board, after a full examination of the contract, apportionment, and account of such commissioner, duly filed with such clerk as aforesaid required. The books and records of such commissioner shall be deemed public records, open for examination to all persons interested therein, and on removal of such commissioner such records and accounts shall be returned to and filed with the clerk of the board of supervisors of his county."

SEC. 4. Details proceedings on application for construction of drain.

SECS. 5 and 6. Provides for proceedings where right of way cannot be obtained.

SEC. 7. Provides for construction of drain by the owners of the land.

SEC. 8. "If all the owners of the lands through which such drain or drains are located shall not pay the expenses incurred, and contract to build such drain or drains, as provided in section seven of this act, said commissioner shall make, or cause to be made, maps of said lands, designating thereon the length, depth, width, position, and direction of every ditch or drain by him laid out and established, also the number of acres of every section or part of section of lands to be benefited by said ditches or drains, and shall estimate and assign the construction of an equitable part or parts of such drain or drains to each parcel of land to be so benefited, describing such parts of drains by said division stakes, and stakes subdividing such divisions, if need be. And where such drain or drains will benefit highways, said commissioner shall estimate also the amount of such benefit, and assign the same to the township to which such highway belongs. He shall make an estimate of the sum necessary to be raised to pay the incidental expenses of making such ditches or drains, and for damages, if any, and the portion thereof that ought to be assessed on each parcel, section, or part of section of land to be benefited thereby, and the amount to be raised in each township for such incidental expenses and damages. The incidental expenses, damages, and expenses of construction of drains shall be assessed on the several parcels of land benefited or injured, in proportion to the benefit or injury to accrue to each such parcel of land from such drains; *Provided*, That no assessment shall be levied on the lands not actually benefited."

SEC. 9. Provides for letting of contract for construction of drain, and notice to resident owners or occupants of the lands assessed by meeting for review and correction of the survey and apportionment of cost of construction, etc.

SEC. 10. Provides for the extending the time of reletting of contracts.

SEC. 11. "Said commissioner shall make a full report of all his doings in the premises, accompanied with surveys, if necessary, and all other matters needful to a full exhibition of his action on such drain, and present the same to the board of supervisors at their next annual meeting, using such blanks and forms as may be necessary for this purpose; and the board of supervisors shall, at such meeting, charge the aggregate sums as they are so apportioned, against the proper townships, and direct the supervisor of each township in which any portion of said drain, or drains, may be ordered to be constructed or tax levied, to levy the same upon the several parcels of land described in said report of his township, according to the apportionment of said commissioner, and direct the township treasurer to collect and pay such sums to the county treasurer in like manner, and at the same time with other taxes; Provided, said report and apportionment shall contain a description, and the amount of the assessment, which shall not exceed twenty-five per cent of the previous year's assessed valuation of each parcel of land, specifying each piece or parcel of land by usual subdivisions of sections of all land through which such drain, or drains, may run, or which, in his opinion, are actually benefited thereby, and be published in some newspaper within the county,

at least three weeks in succession, previous to the said meeting of the board of supervisors."

SEC. 12. Provides for return of delinquent taxes.

SEC. 13. Gives power to commissioner to relocate, alter and extend drains, etc.

SEC. 14. Provides for drains in highways.

SEC. 15. "Whenever any tax levied for the construction of a drain under this act shall be reported back by the auditor-general to the county treasurer, where the same was levied, or shall be set aside by any court of competent jurisdiction, it shall be lawful for the supervisor of the township to re-assess such tax on the same land where such drain has been made. And it shall also be competent for the board of supervisors, upon the recommendation of the drainage commissioner, or upon a review before them, had by appeal from the action or decision of the drain commissioner, to re-assess upon the various lands, or portions of land, sections, or parts of sections of land by him deemed to be benefited or damaged by any drain or drains, such amount or amounts of drainage taxes, to be assessed, levied and collected as other State and county taxes are assessed, levied and collected, as may be by them deemed necessary to correct any mistake or misapportionment of drain, or of taxes, for the construction of the same, by the drainage commissioner; Provided, such appeal or review be brought before said county supervisors within one year from the time of such alleged mistake or misapportionment on the part of the said drainage commissioner, or by appeal as hereinafter provided."

SEC. 16. Provides for penalties for removing stakes along the line of drain, etc.

SEC. 17. "No money shall be paid by any county treasurer of any county in which a tax is assessed for the purposes of drainage under this act, except on a warrant drawn by such commissioner, countersigned by the chairman and clerk of the board of supervisors of his county, and in the county of Wayne the board of county auditors, and then only from the particular ditch fund provided for such ditch, and not otherwise."

SEC. 18. Provides for the pay of the commissioner.

SEC. 19. "Whenever any order drawn by the commissioner shall be presented to the county treasurer, and there shall be no funds in his hands applicable to the payment thereof, the county treasurer shall indorse thereon the date of such presentation, with his signature thereto. Such order shall draw interest from and after such presentation and indorsement."

SEC. 20. Provides for proceedings on application for drain in two counties.

SEC. 21. Provides for appeals in such cases.

SEC. 22. "All bids made for any of the lands which may be sold for taxes assessed under the provisions of this act may be paid in warrants drawn under the provisions of this act by the commissioner on

the treasurer of said county in which the lands are situated, if drawn for the construction of drains, incidental expenses or commissioner's services, for which said lands are to be sold; and such warrant shall, if tendered, be received by the Auditor-General or treasurer of the county in which they were drawn in payment for any such tax that may be returned delinquent."

SEC. 23. "For the information of all persons concerned, the said commissioner shall make a full report, in writing, to the board of supervisors of the proper county, at the next and each annual session thereafter, setting forth as nearly as practicable:

"*First.* What proportion of the ditches or drains, for the construction of which a tax has been levied, is completed, and the amount paid therefor;

"*Second.* What proportion is under contract and not completed, and the amount to be paid therefor, and whether such contract or contracts are likely to be performed; also the proportion not yet under contract, and the estimated cost of their construction, and whether there is a sufficient amount of unexpended funds created by such tax to complete the work;

"*Third.* What amount of such funds has been expended, and for what purpose, exhibiting the items of such expenditures as fully as may be practicable; and also, what amount of warrants has been drawn by him against such fund, and shall also report all such other matters in relation to the subject as he may deem necessary, or said board of supervisors may require."

SEC. 24. "The board of supervisors of each county in which a commissioner shall be appointed shall have full power and authority to control the action of such commissioner, and may order a reassessment of the drain tax, or any portion thereof, to correct errors, as provided in section fifteen of this act, and may make any other order in relation to such ditches or drains, or other matter relating thereto, not inconsistent with the public interests, or the rights of individuals, which order shall be binding on such commissioner."

SEC. 25. "Said commissioner shall issue his order upon the county treasurer for the amount of such damages as may be allowed to any person or persons, their agent or attorney, by reason of the construction of any drain, or drains, under this act. Such order, or orders, shall be paid by said treasurer out of any moneys in the treasury, in pursuance of the provisions of this act."

SECS. 26 to 32, inclusive, immaterial.

SEC. 33. "The collection of no tax or assessment levied, or ordered to be levied, to pay for the location and construction of any ditch, or drain, or watercourse, laid out and constructed under and by authority of this act, or the act to which this act is amendatory, shall be perpetually enjoined or declared absolutely void in consequence of any error committed by the drain commissioner, the supervisors of the respective townships, the board of supervisors, or their chairman or clerk, in the location and establishment thereof, nor by reason of any error or informality appearing in the record of the proceedings by which any ditch,

drain or watercourse shall have been located and established. But the court in which any proceeding is now pending, or which may hereafter be brought, to reverse or declare void the proceedings by which any ditch, drain or watercourse has been located, or established or to enjoin the tax levied to pay for the labor and costs, and expenses aforesaid, shall, if there be manifest error in said proceedings, set the same aside and allow the plaintiff in the action to come in and show wherein he has been injured thereby. The court shall, on application of either party, appoint such person or persons to examine the premises, or to survey the same, or both, as may be deemed necessary; and the court shall, on a final hearing, make such an order in the premises as shall be just and equitable, and may order such tax to remain on the roll for collection, or order the same to be levied, or may perpetually enjoin the same, or any part thereof, or if the same shall have been paid under protest, shall order the whole, or such part thereof as may be just and equitable, to be refunded, the cost of said proceedings to be apportioned amongst the parties, or to be paid out of the county treasury, as justice may require."